



**Review of the Workers' Compensation and Injury Management Act 1981**

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# Final Report

**June 2014**

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WorkCover WA, Review of the Workers' Compensation and Injury  
Management Act 1981: Final Report, June 2014



# Contents

**CONTENTS..... 3**

**INTRODUCTION ..... 9**

    The review process..... 10

    The Final Report ..... 11

    Part structure ..... 12

    Cost impacts ..... 13

**EXECUTIVE SUMMARY ..... 15**

    A new statute (pp41-43)..... 15

    Application of the Act ..... 15

    Compensation (pp67-130) ..... 16

    Injury Management (pp132-156) ..... 19

    Medical Assessment (pp157-161) ..... 20

    Liability and Insurance (pp163-204) ..... 20

    Dispute Resolution (pp205-210) ..... 20

    Common law (pp211-220) ..... 21

    Scheme regulation and administration (pp221-224)..... 21

**RECOMMENDATIONS ..... 23**

**LEGISLATIVE STRUCTURE AND REWRITE ..... 41**

    The current Act ..... 41

    Structure of the new statute ..... 41

**PART 1 – PRELIMINARY ..... 45**

**GENERAL.....45**

    Proposed Part structure ..... 45

**DEFINITION OF WORKER.....47**

**PARTICULAR CLASSES OF WORKERS ..... 55**

    Work for private householders ..... 55

    Public company directors..... 56

    Religious workers..... 58

    Government workers and nomenclature of the Crown ..... 60

**EMPLOYMENT CONNECTION TO WESTERN AUSTRALIA..... 62**

    Overseas workers ..... 62

**ADDITIONAL ISSUES RAISED BY STAKEHOLDERS ..... 65**

    Stress claims – reasonable administrative action..... 65

**REPEALED PROVISIONS ..... 67**



Tributers.....	67
Application to maritime workers.....	67
Application of Act - pre 1977 claims.....	67
<b>PART 2 – COMPENSATION.....</b>	<b>68</b>
<b>GENERAL.....</b>	<b>69</b>
Proposed Part structure.....	69
Key changes.....	69
<b>KEY TERMINOLOGY.....</b>	<b>71</b>
Compensation and related definitions.....	71
<b>MAKING A CLAIM.....</b>	<b>73</b>
Requirement to give notice.....	73
Claim process for insurers and self insurers.....	73
Consistent claim process.....	74
Pended claims.....	76
Recurrence.....	79
Consent authority.....	80
<b>COMPENSATION ENTITLEMENTS.....</b>	<b>82</b>
Weekly payments.....	82
Entitlement to leave while incapacitated.....	85
First aid and emergency expenses.....	86
Common law impairment assessment expenses.....	87
<b>NOISE INDUCED HEARING LOSS.....</b>	<b>88</b>
Level of technical oversight.....	89
Prescribed workplace.....	91
NIHL claim process.....	92
Related claim proposals.....	95
No baseline test.....	95
Assessment of work relatedness by audiologists.....	96
Liability for NIHL claims.....	97
Additional issue raised by stakeholders.....	98
<b>INDUSTRIAL DISEASES.....</b>	<b>99</b>
Consolidation of asbestos diseases provisions.....	99
Lump sum payment for asbestos diseases.....	100
Successive lung diseases.....	101
Claim and assessment process for asbestos diseases.....	102
<b>COMPENSATION FOR DEATH.....</b>	<b>110</b>
<b>CLAIM MANAGEMENT.....</b>	<b>116</b>
Structure of claim management division and provisions.....	116
Medical examinations.....	116
Variation of weekly payments.....	116
Discontinuing or reducing weekly payments.....	117
Remuneration from another employer.....	118
Worker residing outside the State/Commonwealth.....	120
Overseas medical practitioners.....	121
Suspension of weekly payments when in custody.....	122
Disputes between employers/insurers.....	123
Settlements.....	125



<b>DISCUSSION PAPER PROPOSALS NOT RECOMMENDED IN THE FINAL REPORT .....</b>	<b>129</b>
Minor claims .....	129
Persons prescribed to issue medical certificates .....	129
Permanent impairment.....	130
<b>ADDITIONAL ISSUES RAISED BY STAKEHOLDERS .....</b>	<b>131</b>
Unilateral variation of compensation.....	131
Age limits on compensation .....	132
<b>PART 3 – INJURY MANAGEMENT .....</b>	<b>133</b>
<b>GENERAL.....</b>	<b>133</b>
Proposed Part structure .....	133
Key changes .....	133
<b>MEDICAL CERTIFICATES AND WORK CAPACITY .....</b>	<b>135</b>
Medical certificates and work capacity .....	135
<b>INJURY MANAGEMENT OBLIGATIONS .....</b>	<b>138</b>
Code of practice .....	138
Return to work programs .....	139
Injury management case conferences.....	140
<b>PRE INJURY POSITION, SUITABLE DUTIES AND DISMISSAL.....</b>	<b>144</b>
Provision of pre-injury position and suitable duties .....	144
Dismissal of injured worker.....	146
<b>WORKPLACE REHABILITATION.....</b>	<b>148</b>
Workplace rehabilitation.....	148
Specialised retraining programs .....	149
<b>MEDICAL AND ALLIED HEALTH SERVICES .....</b>	<b>151</b>
<b>DISCUSSION PAPER PROPOSALS NOT RECOMMENDED IN FINAL REPORT .....</b>	<b>153</b>
Definition of return to work .....	153
Health services directions .....	153
<b>ADDITIONAL ISSUES RAISED BY STAKEHOLDERS .....</b>	<b>154</b>
Pain management programs .....	154
Employer attendance at medical appointments.....	154
Liability for work trials with host employers.....	155
<b>PART 4 – MEDICAL ASSESSMENT .....</b>	<b>157</b>
<b>GENERAL.....</b>	<b>157</b>
Proposed Part structure .....	157
Key changes .....	157
<b>APPROVED MEDICAL SPECIALISTS .....</b>	<b>158</b>
Approved Medical Specialists.....	158
Evaluation of impairment .....	159
<b>PANELS AND ADVISORY COMMITTEE .....</b>	<b>160</b>
Medical assessment panels.....	160
Medical Advisory Committee .....	160



<b>PART 5 – LIABILITY AND INSURANCE .....</b>	<b>163</b>
<b>GENERAL.....</b>	<b>163</b>
Proposed Part structure .....	163
Key changes .....	163
Terminology .....	164
<b>EMPLOYERS’ OBLIGATIONS.....</b>	<b>165</b>
Scope of duty to insure .....	165
Remuneration and records .....	166
Record keeping requirements.....	166
Insurance obligations of deemed employers .....	167
Safety net claims – principals .....	169
<b>CONTRACTUAL INDEMNITIES .....</b>	<b>171</b>
<b>SELF INSURANCE .....</b>	<b>174</b>
Self insurance .....	174
<b>LICENSED INSURERS .....</b>	<b>177</b>
Licensing and performance monitoring of insurers.....	177
References to insurer.....	178
Request for insurance.....	179
Scope of insurer’s duty to insure and indemnify employers .....	181
<b>INSURANCE POLICIES.....</b>	<b>183</b>
Burning cost policies .....	183
Lapsed policies .....	185
Cancellation of policies .....	187
Regulation of insurance policies .....	188
<b>INSURANCE COMMISSION OF WESTERN AUSTRALIA .....</b>	<b>191</b>
<b>INSURANCE ARRANGEMENTS FOR SPECIFIED INDUSTRIAL DISEASES .....</b>	<b>194</b>
<b>ACTS OF TERRORISM.....</b>	<b>196</b>
<b>PREMIUM RATES.....</b>	<b>199</b>
<b>DISCUSSION PAPER PROPOSALS NOT RECOMMENDED IN FINAL REPORT .....</b>	<b>200</b>
Safety net governance and funding .....	200
<b>ADDITIONAL ISSUES RAISED BY STAKEHOLDERS .....</b>	<b>202</b>
Discontinuation of 75% loading application process .....	202
Flexibility for more than one set of premium rates.....	202
Clarification of remuneration.....	202
Status of Local Government Insurance Scheme .....	203
Premium exemption for apprentice wages .....	203
<b>PART 6 – DISPUTE RESOLUTION .....</b>	<b>204</b>
<b>GENERAL.....</b>	<b>205</b>
Proposed Part structure .....	205
Key changes .....	205
<b>REGISTERED AGENTS .....</b>	<b>206</b>
<b>DISCUSSION PAPER PROPOSALS NOT RECOMMENDED IN FINAL REPORT .....</b>	<b>210</b>
Conciliation filing requirement.....	210



<b>PART 7 – COMMON LAW .....</b>	<b>211</b>
<b>GENERAL.....</b>	<b>211</b>
Proposed Part structure .....	211
Key changes .....	211
<b>PURSUING DAMAGES .....</b>	<b>212</b>
Termination day .....	212
Election to pursue common law damages .....	214
Commencement of proceedings .....	215
<b>DISCUSSION PAPER PROPOSALS NOT RECOMMENDED IN FINAL REPORT .....</b>	<b>218</b>
Common law settlements .....	218
<b>ADDITIONAL ISSUES RAISED BY STAKEHOLDERS .....</b>	<b>219</b>
Settlement/ recovery involving third party actions .....	219
<b>PART 8 – SCHEME REGULATION AND ADMINISTRATION .....</b>	<b>221</b>
<b>GENERAL.....</b>	<b>221</b>
Proposed Part structure .....	221
Key changes .....	221
<b>INFORMATION MANAGEMENT .....</b>	<b>222</b>
<b>PENALTIES AND OFFENCES .....</b>	<b>223</b>
Offences.....	223
Penalty units .....	223
Infringement notices.....	224
<b>PART 9 – MISCELLANEOUS .....</b>	<b>225</b>
<b>GENERAL.....</b>	<b>225</b>
Proposed Part structure .....	225
Key changes .....	225
Regulations .....	225
<b>APPENDICES .....</b>	<b>227</b>
<b>APPENDIX 1 – INDICATIVE STRUCTURE OF NEW STATUTE .....</b>	<b>227</b>
<b>APPENDIX 2 – REPEALED PROVISIONS.....</b>	<b>248</b>
<b>APPENDIX 3 – PROPOSED AMENDMENTS TO CURRENT PENALTIES.....</b>	<b>254</b>
<b>APPENDIX 4 – LIST OF STAKEHOLDER SUBMISSIONS .....</b>	<b>256</b>
<b>APPENDIX 5 – GLOSSARY .....</b>	<b>259</b>



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## Introduction

1. The *Workers' Compensation and Injury Management Act 1981* (the Act) establishes the workers' compensation scheme for Western Australia and provides the legal and administrative framework for:
  - the liabilities of employers to pay no fault compensation to workers for a work related injury;
  - injury management and return to work obligations of employers, employers' insurers and workers;
  - insurance and self insurance;
  - the hearing and determination of disputes between parties involved in workers' compensation matters;
  - the commencement of proceedings and limitations on the awarding of damages for workplace injuries;
  - the regulation of service providers;
  - administration of the scheme.
2. The workers' compensation scheme is performing well in Western Australia. However, the complexity of the legislation is a source of confusion and frustration for scheme participants.
3. The Act has been amended on a piecemeal basis since its adoption in 1981. A significant number of successive amendments has resulted in a complex and highly prescriptive statute which is difficult to understand and apply.
4. In 2009 the Government supported a two stage review of Western Australia's workers' compensation legislation.
5. Stage one of the review has been completed with the passage of amendments to the Act in 2011. These amendments implemented a restructure of the workers' compensation dispute resolution system, and various changes to address legislative anomalies and specific policy issues, including:
  - removal of all aged based limits on workers' compensation entitlements;
  - extension of the safety net arrangement for workers awarded common law damages against uninsured employers;
  - inclusion of 'diffuse pleural fibrosis' as an asbestos related disease;
  - removal of the time limit to issue a writ after a common law election.

6. The second stage and focus of this review is to make recommendations for a new workers' compensation statute which address:
  - outstanding proposals from the *Workers' Compensation and Injury Management Act 1981– Legislative Review 2009* (Legislative Review 2009);
  - identified technical and process issues with the current legislation;
  - the need to enhance readability and consistency in the legislation including contemporary language and drafting conventions.
7. This review does not involve a broad ranging examination of benefits and entitlements or other fundamental design aspects of the scheme. These areas will be impacted only in relation to structural and process improvements to the Act. An exception is the recommended increase in the death entitlement which is almost universally supported by stakeholders.

## The review process

8. It is acknowledged restructuring and redrafting of the legislation will be a major undertaking, and significant technical work and consultation is required.
9. The review process comprises:
  - Discussion Paper released seeking feedback on WorkCover WA proposals;
  - consultation with all stakeholders and call for submissions;
  - assessment of submissions and preliminary cost impacts;
  - finalisation of WorkCover WA recommendations to Government;
  - Cabinet approval of drafting instructions;
  - release of exposure draft of the new statute for legal review and stakeholder technical feedback to mitigate any unintended consequences;
  - finalisation of bill for a new statute;
  - introduction of bill into Parliament.
10. In September 2013 WorkCover WA released the *Review of the Workers' Compensation and Injury Management Act 1981: Discussion Paper* (Discussion Paper) to facilitate consultation with scheme stakeholders.
11. The closing date for submissions was 7 February 2014.
12. The Discussion Paper was based on WorkCover WA's internal review of the legislation which took into account stakeholder issues raised over many years including those identified but not progressed in the Legislative Review 2009.

13. Following the release of the Discussion Paper WorkCover WA actively consulted with representative and interest groups to discuss particular issues and alternative options in more detail.
14. WorkCover WA participated in 25 meetings and workshops and provided daily assistance to stakeholders preparing submissions on technical and process issues.
15. WorkCover WA received 66 submissions and acknowledges the significant contribution of stakeholders to the review process. A list of representative bodies, interest groups, individual organisations and persons that made submissions is at Appendix 4.

## The Final Report

16. The *Review of the Workers' Compensation and Injury Management Act 1981: Final Report* (Final Report) recommends the drafting of a new statute and includes 171 specific recommendations for inclusion in the new statute.
17. WorkCover WA has undertaken a consultative approach in the legislative review process and finalisation of recommendations which has involved:
  - meetings and workshops with stakeholders;
  - detailed consideration of all 66 written submissions;
  - approval by the WorkCover WA Board.
18. There is strong stakeholder support for a rewrite of the Act and submissions received focus on particular proposals or issues requiring attention. As a result of the consultation process there are a number of proposals from the Discussion Paper that are not recommended in the Final Report, some that vary from what was proposed, and a small number of new recommendations. These are clearly identified in the Final Report.
19. The Final Report is comprised of:
  - an executive summary;
  - a list of recommendations;
  - a general section discussing the legislative structure and recommendations for the rewrite of the Act. This section outlines the case for a more flexible, responsive and modern statute and the high level recommendations for a redrafted and restructured Act;
  - a series of chapters which align with the recommended Parts of the new statute. Stakeholder views and WorkCover WA's recommendations on all Discussion Paper proposals are integrated within the chapter structure of the report;

- appendices including an outline of the recommended new statute (Appendix 1).
20. The Final Report is the outcome of WorkCover WA's review and does not represent a settled Government position.

## Part structure

21. Each part in this Final Report corresponds to the Part structure of the recommended statute.
22. **Part 1 – Preliminary** considers whole of statute issues such as application of the Act and definitions.
23. **Part 2 – Compensation** consolidates in one chapter the compensation entitlements of injured workers along with the processes associated with making, managing and settlement of claims.
24. **Part 3 – Injury management** clarifies issues relating to injury management and return to work obligations, the issuing of medical certificates and legislative arrangements impacting on medical and allied health treatment and workplace rehabilitation services.
25. **Part 4 – Medical assessment** considers the legislative arrangements for appointing and regulating Approved Medical Specialists (AMS), the processes around evaluation of impairment and the convening of medical panels.
26. **Part 5 – Liability and insurance** establishes the workers' compensation liabilities of employers and associated insurance obligations. The Part also provides for the approval of insurers and self insurers, and processes for fixing recommended premium rates.
27. **Part 6 – Dispute resolution** includes changes to the regulatory regime for registered agents.
28. **Part 7 – Common law** covers the procedural requirements, and constraints on awards of common law damages.
29. **Part 8 – Scheme Regulation and administration** sets out the regulatory functions and powers of WorkCover WA and the legislative framework for administering the scheme.
30. **Part 9 – Miscellaneous** incorporates and consolidates miscellaneous issues not captured by the other parts.

## Cost impacts

31. Recommended changes to the entitlement for dependants of deceased workers is an area of the legislative review where cost impacts have been identified. WorkCover WA engaged PricewaterhouseCoopers (Western Australia) (PwC) to undertake an actuarial analysis of the recommended changes. Based on the 2013/14 financial year PwC estimate the increased death entitlements will result in an additional scheme cost of \$3.2 million per annum which equates to a 0.33% increase in the 2013/14 recommended premium rate for the scheme.
32. No material cost impacts are expected as a result of other recommendations. Given the nature of the changes the cost impacts are likely to be cost neutral but are not readily quantifiable. If the Government approves the drafting of a Bill it is intended for the actuary to assess the Bill for any potential cost impacts prior to final approval by the Government and introduction to Parliament.



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## Executive summary

### A new statute (pp41-43)

34. There is strong stakeholder support for a rewrite of the Act. It is recommended the Act is repealed and replaced with a new statute which reorders and moves related provisions together in a Part structure that aligns with the practical operation of the scheme. The new statute will also be drafted with the objective of introducing plain language and contemporary drafting conventions.
35. The new statute will incorporate the recommendations in the Final Report whilst preserving, to the extent possible, the intent of other provisions of the Act.
36. A mandatory review of the Act at least every 5 years is recommended in line with modern statutes.

### Application of the Act

#### Definition of worker (pp47-52)

37. A clear definition of 'worker' is a fundamental threshold requirement for claimants seeking access to entitlements and for employers in ensuring they have the appropriate level of insurance.
38. Lack of clarity in the current definition in the Act makes it difficult for employers and workers to assess workers' compensation coverage and liability at the commencement of their employment arrangement, particularly in relation to contractors.
39. A new definition of 'worker' is recommended based on an 'employee' for the purpose of assessment for Pay As You Go (PAYG) withholding under the Commonwealth *Taxation Administration Act 1953*.
40. The PAYG method is well established and understood by industry participants for tax purposes and provides a higher level of certainty to employers and workers about coverage under the scheme than other alternative definitions.
41. The majority of workers who work under a contract of service will not be affected by the change. The main impact will be in relation to some contractors under a contract for service who provide personal manual labour or services to someone else but may operate in partnership, have the ability to sub-contract, employ other labour or work for a fixed price up front.

42. It is recommended the new statute authorise regulations to include or exclude from the definition of worker particular arrangements under which a person works for another in prescribed work or work of a prescribed class.

### **Work for private householders (pp55-56)**

43. It is recommended a person who is engaged by a homeowner to provide domestic services in a private home is not a 'worker' and therefore excluded from workers' compensation liability and insurance requirements.
44. The exclusion will not apply if the person providing the service is employed by someone who is not the owner or occupier. This clarifies a liability does not attach to a homeowner for domestic services. However, liability will attach to any employer other than the owner or occupier with whom the person providing the work has an employment relationship (e.g. cleaner is engaged by a cleaning company to provide services to a homeowner).
45. The exclusion will not apply if the person is engaged to provide care or assistance to a person in prescribed circumstances.

### **Public company directors, religious workers, overseas workers (pp56-58; 58-60; 62-64)**

46. The Final Report recommends the new statute provide access to the scheme for public company directors on the same terms as other working directors.
47. It is also recommended the provisions regarding religious workers be consolidated in the new statute.
48. As the Act does not provide sufficient clarity in relation to overseas workers, it is recommended the new statute include a provision for overseas workers based on an express period of cover for 24 months based on arrangements in place before the 2004 legislative reforms.

### **Compensation (pp69-132)**

49. The compensation part of the new statute will consolidate in one chapter the compensation entitlements of injured workers along with the processes associated with making, managing and settlement of claims.



### **Clarification of key terms and claims processes (pp71-76)**

50. The claims process will be streamlined with common requirements regardless of whether a claim is made for medical expenses and/or weekly payments or is made against an insurer, self insurer or uninsured employer. The processes for making a claim will be shifted to regulations where appropriate.

### **Pended claims (pp76-79)**

51. Claims are 'pended' where a decision on liability cannot be made within the timeframes specified in the Act for insurers and self insurers. The extended period over which a number of pended claims remain unresolved is an ongoing concern.
52. WorkCover WA considered the merits of approaches in other jurisdictions where provisional payments are made from the outset along with feedback from stakeholders. A new process for pended claims is recommended.
53. It is recommended payment of weekly earnings and medical expenses are to commence on a without prejudice basis within 14 days after notice is given that an insurer is unable to make a decision on liability within the required timeframe. Payments for medical expenses will be capped at \$5,000. To allow for timely medical review of complex claims the existing limitations in the Act will be removed that prevent medical review within the first month from the certificate of capacity.

### **Weekly payments (pp82-85)**

54. There are currently two different systems for calculating weekly payments for workers, with award and non-award based workers being treated differently.
55. The complexity and subjectivity of calculating earnings for award workers has been consistently raised with WorkCover WA as an area in the Act that requires attention, particularly in relation to the treatment of over award and service payments payable after week 13.

56. It is recommended the new statute treat all workers on the same basis, with earnings calculated by reference to pre-injury earnings and common step down provisions to 85% of pre-injury earnings after week 13. To minimise the impact on certain award workers who would be disadvantaged by the step down provision it is recommended a minimum protection apply so that after week 13 award workers receive the greater of:
- 85% of pre injury earnings; or
  - the base award rate of pay under the relevant award, exclusive of over award payments such as service payments, allowances and overtime.

### **Noise induced hearing loss (pp88-98)**

57. Various changes are proposed to the framework for noise induced hearing loss (NIHL). Standards will continue to be required for audiometric testing processes although changes will be made to the level of technical oversight by WorkCover WA. A subsequent audiometric test indicating 10% or more hearing loss will be deemed *prima facie* evidence of the worker sustaining NIHL. NIHL liability will be apportioned between employers that have contributed to the NIHL proportionate to the period of employment over a ten year period.

### **Asbestos related diseases (pp99-109)**

58. The provisions relating to asbestos disease claims will be located in the compensation part of the Act and a number of changes are proposed to clarify the status of the asbestos diseases lump sum entitlement.
59. The new statute will consolidate and simplify the claim procedure and determinations required for asbestos diseases for statutory and common law purposes.

### **New framework for death and funeral entitlements (pp110-115)**

60. Western Australia has the second lowest entitlement for the dependents of a deceased worker of all workers' compensation jurisdictions. The Final Report recommends an increase in the death entitlement lump sum to 2.5 times the prescribed amount. This would address a significant entitlement gap between Western Australia and other workers' compensation jurisdictions. The statute will also simplify the method for apportioning the lump sum where there is more than one totally dependent family member.

### Settlement pathways (pp125-128)

61. There are two settlement pathways under the current Act – a statutory settlement pathway under s76 and a common law settlement pathway under s92(f).
62. There has been a general trend toward an increased use of the common law pathway to settle difficult statutory claims as there is minimal criteria and oversight. The use of the common law settlement pathway to settle statutory claims is due to a legal loophole in the statute and would not otherwise be available for statutory claims.
63. The Final Report recommends the common law settlement pathway be restricted to genuine common law claims where a worker has an assessed level of whole person impairment of at least 15% and has registered an election to pursue damages. The statutory settlement pathway will be available:
  - if a period of 6 months has elapsed after the claim was first accepted or determined; or
  - if a period of 6 months has not elapsed or the claim has not been accepted or determined, if the settlement meets “special circumstances” criteria prescribed in regulations.
64. The special circumstances criteria for statutory settlements will include complex cases identified through the stakeholder consultation process, including psychological injury claims and disputed claims which have been conciliated.

### Injury Management (pp133-156)

65. Changes are recommended to reinforce return to work objectives. Medical practitioners will be required to certify the period of incapacity as well as specify what a worker ‘can do’.
66. Participation by the worker in an injury management case conference will be mandatory if requested by an employer or insurer. An injury management case conference may not be used for liability related issues and limits in frequency will apply.
67. It is recommended the obligation on an employer to hold a worker’s pre injury position open or provide alternative duties be clarified together with the provisions relating to a dismissal of an injured worker.
68. The new statute will also clarify liability and insurance requirements when a worker is placed on a work trial or participating in a return to work program with a host employer.

## Medical Assessment (pp157-161)

69. Changes are proposed to improve the effectiveness of the regulatory framework for approved medical specialists and common arrangements for medical assessment panels will be implemented.

## Liability and Insurance (pp163-203)

70. The Final Report recommends terms and conditions of standard employer indemnity policies be regulated along with policy endorsements or extensions.
71. The new statute will also recognise 'burning cost' policies as an optional method for calculating premiums where agreed between employers and insurers.
72. The Final Report recommends the new statute prohibit workers' compensation policies or endorsements covering contractual indemnities in respect of an insured employer's undertaking to indemnify a third party for the third party's liability to pay damages. The prohibition will not affect insurance arrangements between a principal and contractor where the principal extends its statutory indemnity provided under the Act to cover common law damages.
73. Asbestos liabilities of mining employers will be integrated into conventional insurance policies and the special insurance arrangement with the Insurance Commission of Western Australia will be discontinued. The new statute will also clarify the status of the Insurance Commission of Western Australia as a licensed insurer for public authorities.
74. The Final Report recommends the repeal of the *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001* with relevant provisions integrated in the new statute. Key changes include an increase in the collective liability cap from \$25 million to \$100 million and improvements to the claims process.

## Dispute Resolution (pp205-210)

### Discontinuation of the regulatory regime for registered agents (pp206-209)

75. The Act provides a regime where a person who is not a legal practitioner may apply for registration by WorkCover WA as a registered agent. A registered agent may represent a party to a dispute in the Conciliation and Arbitration Services and charge for services provided in accordance with the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2014*.

76. Although there are just over 200 registered agents almost all are employees of organisations and subject to their employer's oversight. In practice the substance of the registered agent regime is focussed on four independent registered agents.
77. WorkCover WA considers that it is an inappropriate use of resources to maintain a comprehensive regime of registration, including audit, on an ongoing basis for only four individuals.
78. The Final Report recommends the discontinuation of the regulatory regime for registered agents and the consequential amendment of the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2014*.
79. It is acknowledged this recommendation will significantly impact the four independent registered agents currently operating in the scheme. It is recommended the independent registered agents be transitioned out of the scheme over a 2 year period from a date set in the new statute.

## Common law (pp211-220)

### Discontinuation of the termination day (pp212-214)

80. It is recommended the termination day applicable to common law damages be discontinued.
81. Abolition of the termination day for common law claims will remove a significant administrative burden on workers, employers, insurers and WorkCover WA. The existing procedural requirement to elect on the basis of a 15% whole person impairment will continue to ensure the common law pathway is reserved for the more significant injuries.

## Scheme regulation and administration (pp221-224)

### Penalties and offences (pp223-224)

82. The penalties regime has not been reviewed since the Act was first introduced in 1981. A recent review of the penalties indicates in some cases fines under the Act are significantly lower than in other jurisdictions.
83. Penalties have been reviewed with a view to imposing a penalty that reflects the nature of the offence including consideration of:
  - the impact that the offending behaviour has on other parties;
  - the behaviour's capacity to undermine fundamental premises of the scheme; and
  - the need to deter such behaviour in the future.



84. The Final Report recommends fines in the new statute be based on the reviewed amounts in Appendix 3 of the report and a penalty system be introduced for all offences which includes automatic indexation.

## Recommendations

### LEGISLATIVE STRUCTURE AND REWRITE

<b>Rewrite of the Act</b> .....	43
<b>R:1</b> It is recommended the Act be repealed and replaced with a new statute. ....	43
<b>R:2</b> It is recommended the structure of the new statute be based on the outline at Appendix 1.....	43
<b>R:3</b> It is recommended the new statute be redrafted with the objective of introducing plain language and contemporary drafting conventions.....	43
<b>R:4</b> It is recommended the new statute incorporate the amendments proposed in subsequent parts of this report whilst preserving, to the extent possible, the intent of other provisions of the Act. ....	43
<b>R:5</b> It is recommended the new statute include a mandatory review clause to ensure formal review of its operation every 5 years.....	43

### PART 1 - PRELIMINARY

<b>Definition of worker</b> .....	52
<b>R:6</b> It is recommended the definition of ‘worker’ in the new statute be based on the definition of an ‘employee’ for the purpose of assessment for PAYG withholding under the <i>Taxation Administration Act 1953</i> (Cth).....	52
<b>R:7</b> It is recommended the new statute authorise the making of regulations to include or exclude from the definition of worker particular arrangements under which a person works for another in prescribed work or work of a prescribed class.....	52
<b>R:8</b> It is recommended provisions relating to casual workers, police, personal representatives and dependants of deceased workers be structured as separate subsections within the definition of worker.....	52
<b>Work for private householders</b> .....	56
<b>R:9</b> It is recommended regulations provide a person is not a ‘worker’ within the meaning of the new statute while the person is engaged in domestic service in a private home unless: i) the person is employed by an employer who is not the owner or occupier of the private home; and ii) the employer provides the owner or occupier with the services of the person. ....	56
<b>R:10</b> It is recommended the domestic worker exclusion not apply if the person is engaged to provide care or assistance to a person in prescribed circumstances.....	56

<b>Public company directors</b> .....	58
<b>R:11</b> It is recommended the new statute provide access to the scheme for public company directors on the same terms, and subject to the same criteria, as other working directors. ....	58
<b>R:12</b> It is recommended the new statute provide where a statement of earnings is provided by a company in relation to a working director's earnings the minimum weekly payment provisions do not apply. ....	58
<b>Religious workers</b> .....	60
<b>R:13</b> It is recommended provisions regarding 'religious workers' be consolidated in the new statute without reference to any particular faith. ....	60
<b>R:14</b> It is recommended religious workers who do not otherwise meet the definition of 'worker' may be deemed a worker via a declaration process. ....	60
<b>Government workers and references to 'Crown'</b> .....	61
<b>R:15</b> It is recommended a single term (either 'Crown' or 'State') be used to describe the executive government under which public authorities operate. ....	61
<b>R:16</b> It is recommended a claim for compensation or proceedings against the Crown / State be made on the relevant public authority by whom the worker was employed or engaged at the time of the injury. ....	61
<b>Overseas workers</b> .....	64
<b>R:17</b> It is recommended the new statute include a provision for overseas workers based on an express period of cover for 24 months. ....	64
<b>Psychological injuries – reasonable administrative action</b> .....	66
<b>R:18</b> It is recommended the definition of 'injury' exclude psychological injuries (diseases) arising from 'reasonable administrative action' taken by an employer in respect of a worker's employment. ....	66
<b><u>PART 2 - COMPENSATION</u></b>	
<b>Compensation generally</b> .....	72
<b>R:19</b> It is recommended the provisions relating to compensation entitlements be consolidated in the Compensation Part of the new statute. ....	72
<b>R:20</b> It is recommended the new statute define the following key terms: i) prescribed amount; ii) compensation; iii) medical expenses; iv) other expenses. ....	72
<b>R:21</b> It is recommended the annual indexation methodology for the prescribed amount be located in regulations. ....	72





<b>Requirement to give notice</b> .....	73
<b>R:22</b> It is recommended the requirement for a worker to serve written notice of injury on an employer be discontinued.....	73
<b>Claim process</b> .....	74
<b>R:23</b> It is recommended the new statute establish a consistent claim process, applicable to both insurers and self insurers.....	74
<b>Consistent claim process</b> .....	76
<b>R:24</b> It is recommended the new statute introduce a single claim process to accommodate both weekly payments for incapacity and/or medical expenses.....	76
<b>R:25</b> It is recommended regulations prescribe the process for making a claim.....	76
<b>Pended claims</b> .....	79
<b>R:26</b> It is recommended the new statute establish a process for pended claims in accordance with the following: i) payment of weekly earnings and medical expenses commence within 14 days after notice is given that an insurer is unable to make a decision on liability within the required timeframe; ii) payment of medical expenses of up to \$5,000 inclusive of amounts paid prior to commencement of provisional payments; iii) all payments are without prejudice; iv) an insurer be permitted to require a worker to attend at a doctor of the insurer’s choice within a month of issue of a First Certificate of Capacity. ....	79
<b>Recurrence</b> .....	80
<b>R:27</b> It is recommended the claim form and certificates of capacity be amended to include collection of information in relation to the question of recurrence. ....	80
<b>Consent authority</b> .....	81
<b>R:28</b> It is recommended the new statute introduce a mandatory requirement for a worker to provide authority for the collection and release of personal information substantially in the terms of the two authorities already found in the claim form.....	81
<b>R:29</b> It is recommended a worker’s consent authority be made irrevocable for the life of the claim. ....	81
<b>Weekly payments</b> .....	85
<b>R:30</b> It is recommended all workers’ weekly payments be calculated on the basis of their pre-injury earnings over a 12 month period. ....	85

<b>R:31</b>	It is recommended the minimum earnings of workers whose earnings are prescribed by an industrial award be the rate of weekly earnings under the award, exclusive of any over award or service payments, overtime, bonus or allowance. ....	85
<b>R:32</b>	It is recommended a worker’s weekly payments be increased commensurate with any percentage increase to their base rate of pay occurring after the date of injury. ....	85
<b>Entitlement to leave while incapacitated</b> .....		86
<b>R:33</b>	It is recommended the new statute provide: i) a worker may access accrued leave entitlements while incapacitated if agreed with the employer; ii) a worker may receive leave entitlements and weekly compensation concurrently; iii) leave cannot be paid in replacement of weekly compensation. ....	86
<b>First aid and emergency expenses</b> .....		87
<b>R:34</b>	It is recommended the new statute introduce an entitlement to reasonable expenses associated with ambulance or other service used to transport a worker to hospital or other place for emergency medical treatment. The entitlement will not form part of the maximum entitlement for medical expenses. ....	87
<b>Common law impairment assessment expenses</b> .....		87
<b>R:35</b>	It is recommended the entitlement for expenses associated with a worker’s first common law impairment assessment include the cost of referrals to medical practitioners, specialists or allied health providers in order to complete the assessment. ....	87
<b>Oversight of audiometric officers</b> .....		91
<b>R:36</b>	It is recommended the new statute provide for a 3 yearly approval procedure for audiometric officers incorporating conditions requiring use of correctly calibrated equipment. ....	91
<b>R:37</b>	It is recommended the new statute empower WorkCover WA to audit the compliance of audiometric officers with equipment and calibration standards. ....	91
<b>Capacity to require audiometric testing</b> .....		92
<b>R:38</b>	It is recommended WorkCover WA have the power to deem a workplace to be one where audiometric testing must occur. ....	92
<b>Processing noise induced hearing loss claims</b> .....		94
<b>R:39</b>	It is recommended where an audiometric test indicates a 10% loss of hearing that test is deemed as <i>prima facie</i> evidence of noise induced hearing loss and the basis for a claim for compensation.....	94

<b>R:40</b>	It is recommended an employer/insurer may displace the <i>prima facie</i> evidence, within the prescribed timeframe with: i) a full assessment by an audiologist or ENT if the issue relates to the percentage loss of hearing; or ii) an assessment by an ENT if the issue relates solely to work relatedness.....	94
<b>R:41</b>	It is recommended where a party disputes a test in relation to a noise induced hearing loss claim the disputing party is responsible for the cost of any further testing conducted at their instigation. ....	94
<b>Noise induced hearing loss claim management.....</b>		<b>95</b>
<b>R:42</b>	It is recommended the claims process for noise induced hearing loss be prescribed in regulations.....	95
<b>No baseline audiometric test .....</b>		<b>96</b>
<b>R:43</b>	It is recommended where a worker has a single audiometric test which indicates 10% or more loss of hearing, in the absence of agreement with an employer, the worker must obtain and pay for a full audiological assessment and assessment of work relatedness from an ENT.....	96
<b>R:44</b>	It is recommended if a noise induced hearing loss claim is disputed, it may be determined by the Conciliation and Arbitration Services. ....	96
<b>Liability for noise induced hearing loss claims .....</b>		<b>98</b>
<b>R:45</b>	It is recommended the new statute provide the worker is to lodge a noise induced hearing loss claim with the employer who last employed the worker in employment to the nature of which noise induced hearing loss is due. ....	98
<b>R:46</b>	It is recommended the new statute provide liability for noise induced hearing loss claims be apportioned between employers in workplaces to the nature of which noise induced hearing loss is due. Liability will be: i) proportionate to period of employment; and ii) subject to results of relevant hearing tests conducted by an employer within a 10 year apportionment period. ....	98
<b>R:47</b>	It is recommended the new statute empower WorkCover WA to provide information to insurers on the status of insurance coverage of employers.....	98
<b>Repeal of Schedule 5.....</b>		<b>99</b>
<b>R:48</b>	It is recommended Schedule 5 of the current Act be repealed and provisions impacting on compensation for asbestos related diseases be located in the Compensation Part of the new statute. ....	99

<b>Lump sum compensation for asbestos diseases</b> .....	101
<b>R:49</b> It is recommended the new statute define an asbestos diseases lump sum entitlement. ....	101
<b>R:50</b> It is recommended the new statute clarify the asbestos diseases lump sum applies to workers suffering pneumoconiosis, mesothelioma, lung cancer and diffuse pleural fibrosis. ....	101
<b>R:51</b> It is recommended the asbestos diseases lump sum amount be 30% of the prescribed amount.....	101
<b>R:52</b> It is recommended the supplementary weekly payment for asbestos disease be discontinued. ....	101
<b>R:53</b> It is recommended the new statute clarify receipt of the asbestos diseases lump sum finalises statutory payments but does not constrain the right to pursue and receive common law damages. ....	101
<b>Successive lung diseases</b> .....	102
<b>R:54</b> It is recommended the new statute clarify the successive lung disease limitation applies to statutory compensation only and includes diffuse pleural fibrosis. ....	102
<b>Claim and assessment process for asbestos diseases</b> .....	107
<b>R:55</b> It is recommended the new statute consolidate and simplify the claim procedure and determinations required for asbestos diseases for statutory and common law purposes. ....	107
<b>R:56</b> It is recommended the questions required to be determined by the (renamed) Asbestos Diseases Medical Panel are simplified as: i) is, or was, the worker suffering from pneumoconiosis, mesothelioma, lung cancer or diffuse pleural fibrosis? ii) what is the assessed level of permanent whole person impairment attributable to the asbestos related disease?.....	107
<b>R:57</b> It is recommended the new statute provide for regulations to prescribe a special claim form for asbestos diseases and set out the requirements before a determination can be made.....	107
<b>R:58</b> It is recommended the existing special provisions relating to common law assessments for asbestos diseases continue, including: i) no termination day; ii) evaluation of the worker's degree of WPI may be settled by agreement; iii) condition is not required to have stabilised for an assessment of the WPI; iv) assessment to be undertaken by an ADMP panel not an AMS; v) an ADMP panel is not bound by a previous assessment if an election is not recorded.....	107

<b>R:59</b>	It is recommended a worker diagnosed by an ADMP panel with mesothelioma is deemed to have a level of WPI of at least 25% for the purpose of electing to pursue common law damages. ....	107
	<b>Lump sum death entitlement</b> .....	113
<b>R:60</b>	It is recommended the new statute introduce a new maximum 'lump sum death entitlement' for family members totally dependent on the worker's earnings. ....	113
<b>R:61</b>	It is recommended the lump sum death entitlement be set at 2.5 times the prescribed amount.....	113
<b>R:62</b>	It is recommended no deduction is to be made from the lump sum death entitlement for prior workers' compensation payments to the deceased worker. ....	113
	<b>Lump sum apportionment</b> .....	114
<b>R:63</b>	It is recommended the new statute set out, in table form, family members eligible for the lump sum death entitlement and their proportionate share. ....	114
<b>R:64</b>	It is recommended totally dependent children be entitled to a share of the lump sum death entitlement in addition to the prescribed children's allowance. ....	114
<b>R:65</b>	It is recommended the lump sum payment for a partial dependent be an amount proportionate to the loss of financial support suffered. ....	114
<b>R:66</b>	It is recommended the new statute no longer provide for a minimum amount payable as a death entitlement to dependents.....	114
	<b>Dependent child allowance</b> .....	114
<b>R:67</b>	It is recommended the prescribed children's allowance be available to both totally and partially dependent children.....	114
	<b>Dependent child allowance and lump sum</b> .....	114
<b>R:68</b>	It is recommended the requirement for a child to elect between the prescribed children's allowance and lump sum payment be discontinued. ....	114
	<b>Funeral and other expenses</b> .....	114
<b>R:69</b>	It is recommended the new statute consolidate all provisions relating to funeral expenses and medical treatment for a worker who dies.....	114
	<b>Death benefits – Trust Account</b> .....	114
<b>R:70</b>	It is recommended the new statute provide for payment of the prescribed children's allowance from WorkCover WA's Trust Account either weekly or any other period as specified in an order, but not as an advance payment or commutation. ....	114

<b>R:71</b>	It is recommended the new statute provide for the amount of the prescribed children’s allowance to be discharged as a liability of the employer/ insurer by payment of a lump sum to WorkCover WA. ....	114
	<b>Effect of common law damages on compensation trust arrangements</b> .....	115
<b>R:72</b>	It is recommended any dependant who is receiving payments of compensation from WorkCover WA’s trust account is required to notify WorkCover WA of the terms of any subsequent damages award in relation to the worker’s death.....	115
<b>R:73</b>	It is recommended any compensation payable to a dependant from WorkCover WA’s trust account ceases upon payment of damages to the dependant against the employer, whether by way of judgment, consent to judgment or settlement by agreement. ....	115
	<b>Redemption of death benefit claim in certain circumstances</b> .....	115
<b>R:74</b>	It is recommended the entitlement of a dependent to redeem a claim where a worker dies, but the death is not the result of the compensable injury, be discontinued.....	115
	<b>Varying compensation through the Conciliation and Arbitration Services</b> .....	117
<b>R:75</b>	It is recommended the new statute introduce a single provision enabling a worker, employer or insurer to apply to the Conciliation and Arbitration Services to vary (discontinue, suspend, reduce or increase) a worker’s entitlement to weekly payments.....	117
	<b>Remuneration from another employer</b> .....	120
<b>R:76</b>	It is recommended where a worker fails to provide details of remunerated work with another employer upon request, weekly payments may be suspended (without an order of an arbitrator) until the details are provided. ....	120
	<b>Workers leaving Australia</b> .....	121
<b>R:77</b>	It is recommended the new statute clarify when weekly payments can be suspended when a worker is outside Australia for a prescribed period. ....	121
	<b>Overseas medical practitioners</b> .....	122
<b>R:78</b>	It is recommended the new statute extend the definition of ‘medical practitioner’ to include persons appropriately qualified and registered outside the Commonwealth as a medical doctor.....	122
	<b>Suspension of weekly payments when in custody</b> .....	123
<b>R:79</b>	It is recommended the new statute provide, where a worker is in custody or serving a term of imprisonment, entitlements may be suspended by an employer without the order of an arbitrator. ....	123

<b>Disputes between employers/insurers</b> .....	125
<b>R:80</b> It is recommended the new statute clarify the provisions regarding disputes between employers and disputes between insurers, while maintaining the intent of the current provisions.....	125
<b>R:81</b> It is recommended an employer or insurer who has made provisional payments of compensation to a worker be entitled to recover those payments from an employer or insurer who is subsequently agreed or determined to be liable for the injury.....	125
<b>Settlements</b> .....	128
<b>R:82</b> It is recommended statutory settlements be available: i) if a period of 6 months has elapsed after the claim was first accepted or determined; or ii) if a period of 6 months has not elapsed, or the claim has not been accepted or determined, if the claim meets the ‘special circumstances’ criteria prescribed in regulations.....	128
<b><u>PART 3 - INJURY MANAGEMENT</u></b>	
<b>Role of treating medical practitioner</b> .....	136
<b>R:83</b> It is recommended the new statute recognise the injury management role of an injured worker’s treating medical practitioner. ....	136
<b>Issuing of medical certificates and work capacity</b> .....	137
<b>R:84</b> It is recommended medical certificates (certificates of capacity) must: i) certify the injured worker’s incapacity for work; ii) state whether the worker has a current work capacity or has no current work capacity during the period stated in the certificate; iii) specify the expected duration of the worker’s incapacity.....	137
<b>Medical certificate regulations</b> .....	137
<b>R:85</b> It is recommended regulations may prescribe requirements or conditions on the issuing and content of medical certificates.....	137
<b>Form of medical certificates</b> .....	137
<b>R:86</b> It is recommended the new statute empower the WorkCover WA CEO to approve the form of medical certificates. ....	137
<b>Code of Practice (Injury Management)</b> .....	139
<b>R:87</b> It is recommended the <i>Code of Practice (injury management)</i> be discontinued.....	139
<b>R:88</b> It is recommended the key requirements outlined in the <i>Code of Practice (injury management)</i> be located in regulations.....	139



<b>R:89</b>	It is recommended the new statute enable regulations to prescribe requirements for injury management systems and return to work programs. ....	139
	<b>Return to work programs</b> .....	140
<b>R:90</b>	It is recommended the new statute expressly provide a worker must participate in a return to work program (including its establishment) if the employer is required to establish a program. ....	140
	<b>Injury management case conferences</b> .....	143
<b>R:91</b>	It is recommended a worker be required to attend an injury management case conference if requested by the employer or insurer for the purpose of: i) establishing or amending a return to work program; ii) discussing suitable duties and reaching a shared understanding of workplace issues, barriers and return to work opportunities; iii) clarifying any issues or actions identified in a medical certificate or return to work program. ....	143
<b>R:92</b>	It is recommended an injury management case conference must be attended by the worker, the worker's treating medical practitioner, and either the employer or the insurer or both. ....	143
<b>R:93</b>	It is recommended an injury management case conference must not be utilised for the purpose of obtaining a medical examination or medical report or to determine questions of liability. ....	143
<b>R:94</b>	It is recommended if a worker refuses or fails to attend an injury management case conference without reasonable excuse, an order may be sought in the Conciliation and Arbitration Services to suspend the worker's weekly payments. ....	143
	<b>Pre-injury position and suitable duties</b> .....	145
<b>R:95</b>	It is recommended the new statute clarify, where a worker attains partial or total capacity for work, the employer is to provide the worker with their pre-injury position. ....	145
<b>R:96</b>	It is recommended the new statute clarify, where a worker attains partial or total capacity for work but is unable to perform their pre-injury position, the employer is to provide suitable duties to the worker. ....	145
<b>R:97</b>	It is recommended the obligation to provide the pre-injury position or suitable duties apply if it is reasonable or practicable for the employer. The obligation will not apply if the worker has been lawfully dismissed. ....	145
<b>R:98</b>	It is recommended the new statute clarify the requirement to provide the pre-injury position or suitable duties continues for 12 months, commencing when the worker is first totally or partially incapacitated from work. ....	145



<b>Dismissal of injured worker</b> .....	147
<b>R:99</b> It is recommended the new statute clarify that an employer must not dismiss a worker solely or mainly because the worker is not fit for employment in their pre-injury position because of the injury. The prohibition is to apply for a period of 12 months after a worker is first totally or partially incapacitated from work. ....	147
<b>R:100</b> It is recommended the requirement to provide notice of a worker's dismissal to WorkCover WA be discontinued. ....	147
<b>Regulation of workplace rehabilitation providers</b> .....	149
<b>R:101</b> It is recommended the new statute empower WorkCover WA to: i) subject to criteria and conditions, approve a workplace rehabilitation provider for a period not exceeding three years; ii) suspend or revoke an approval; iii) impose conditions on an approval; iv) define services taken to be 'workplace rehabilitation'. ....	149
<b>R:102</b> It is recommended the new statute empower WorkCover WA to: i) establish performance standards for workplace rehabilitation providers generally or specifically and monitor compliance with those standards; ii) adopt the provisions of other publications for the purpose of setting eligibility criteria for approval, and ongoing conditions and performance standards. ....	149
<b>Specialised retraining programs</b> .....	150
<b>R:103</b> It is recommended the specialised retraining program regime be discontinued. ....	150
<b>Medical and allied health services</b> .....	152
<b>R:104</b> It is recommended the new statute enable regulations to prescribe: i) compensable health services; ii) the class of professionals eligible to provide compensable services; iii) any qualifications or experience a person requires to give or provide a compensable service to an injured worker. ....	152
<b>Medical and allied health fees</b> .....	152
<b>R:105</b> It is recommended the Injury Management Part of the new statute contain the regulation making power to fix scales of fees for medical and health services. ....	152

<b>Work trials with host employers</b> .....	156
<b>R:106</b> It is recommended the new statute clarify employers liable to pay compensation to workers are to remain liable for any aggravation of an existing compensable injury or any new injury sustained by workers when engaged on a work trial or in association with a return to work program with a new (host) employer.....	156
<b>R:107</b> It is recommended the new statute clarify insurers are required to indemnify employers for injuries to workers sustained on work trials and return to work programs with host employers. ....	156
<b>R:108</b> It is recommended the extended liability and indemnity for work trials and return to work programs with host employers not apply to any action for damages against the host employer.....	156
<b><u>PART 4 - MEDICAL ASSESSMENT</u></b>	
<b>Regulation of Approved Medical Specialists</b> .....	159
<b>R:109</b> It is recommended the new statute authorise WorkCover WA to establish a regulatory framework for Approved Medical Specialists.....	159
<b>R:110</b> It is recommended Approved Medical Specialists be approved for a 3 year period. ....	159
<b>R:111</b> It is recommended the WorkCover WA CEO be empowered to require an Approved Medical Specialist to produce impairment assessments for inspection and review on request. ....	159
<b>R:112</b> It is recommended the new statute include an express power for WorkCover WA to place conditions on the approval of an Approved Medical Specialist, and suspend or revoke an approval for non-compliance with conditions.....	159
<b>R:113</b> It is recommended the new statute replace the term ‘Approved Medical Specialist’ with ‘Approved Permanent Impairment Assessor (APIA)’. ....	159
<b>Medical Assessment Panels</b> .....	160
<b>R:114</b> It is recommended the new statute empower the WorkCover WA CEO to approve a medical practitioner eligible to be a member of a medical assessment panel. ....	160
<b>R:115</b> It is recommended the new statute empower the WorkCover WA CEO to convene and appoint the Chairperson of all medical assessment panels. ....	160
<b>R:116</b> It is recommended separate provisions for Approved Medical Specialist panels be discontinued.....	160

<b>Medical Advisory Committee</b> .....	161
<b>R:117</b> It is recommended the new statute empower WorkCover WA to appoint medical practitioners to the Medical Advisory Committee. ....	161
<b><u>PART 5 - LIABILITY AND INSURANCE</u></b>	
<b>Policy of insurance - terminology</b> .....	164
<b>R:118</b> It is recommended the new statute refer to ‘policy of insurance’ throughout, rather than ‘contract of insurance.’ .....	164
<b>Audit of remuneration declarations</b> .....	166
<b>R:119</b> It is recommended the new statute provide in prescribed circumstances audit costs incurred by WorkCover WA or an insurer be recoverable from an employer. ....	166
<b>Remuneration declarations – record keeping</b> .....	167
<b>R:120</b> It is recommended the new statute require employers to make and maintain correct records of remuneration of all ‘workers’ employed by the employer and the employer’s industry class on the basis of which an insurer charged premium.....	167
<b>R:121</b> It is recommended the new statute require records of employment be retained for 7 years from the date the record was first created. ....	167
<b>Remuneration declarations in the contract chain</b> .....	169
<b>R:122</b> It is recommended the new statute not require a principal within the meaning of s175 of the current Act to estimate and verify remuneration details of contractors’ workers if: i) the relevant contractor’s insurance policy is extended to indemnify the principal for liabilities under s175; ii) the principal has evidence of the relevant contractor’s valid certificate of currency and principal indemnity extension; iii) the principal verifies this information at commencement and renewal of their own insurance policy. ....	169
<b>Obligation on principal to pay compensation where employer uninsured</b> .....	170
<b>R:123</b> It is recommended the new statute require a principal contractor to be made a party to proceedings if WorkCover WA is made aware the principal contractor may have a liability under the Act. ....	170
<b>R:124</b> It is recommended the new statute require a principal contractor to pay compensation due to a worker of an uninsured employer (with whom the principal is jointly and severally liable), irrespective of whether an award is made against the direct employer only. ....	170

<b>Contractual Indemnities</b> .....	173
<b>R:125</b> It is recommended the new statute prohibit workers' compensation policies or endorsements covering contractual indemnities in respect of an insured employer's undertaking to indemnify a third party in respect of the third party's liability to pay damages. ....	173
<b>R:126</b> It is recommended the prohibition on policy endorsements not apply to a principal extending the statutory indemnity permitted under the current Act to include liability to pay damages to a contractor's workers.....	173
<b>Self insurance approvals</b> .....	175
<b>R:127</b> It is recommended the new statute empower WorkCover WA to approve self insurers and to review, cancel or revoke approvals. ....	175
<b>Conditions on self insurance</b> .....	175
<b>R:128</b> It is recommended the new statute empower WorkCover WA to attach conditions to a self insurance approval at any time during the approval period. ....	175
<b>Requirements for self insurance</b> .....	175
<b>R:129</b> It is recommended the new statute require each self insurer to:	
i) provide a bank guarantee against their liabilities, or other approved security if approved by WorkCover WA;	
ii) hold common law and catastrophic reinsurance cover (in addition to the bank guarantee) on prescribed terms;	
iii) provide WorkCover WA with an annual actuarial assessment of outstanding liabilities on prescribed terms. ....	175
<b>Self insurer performance</b> .....	175
<b>R:130</b> It recommended the new statute provide WorkCover WA with express authority to:	
i) monitor or audit the performance of a self insurer;	
ii) require a self insurer to provide WorkCover WA with relevant information on request.....	175
<b>Use of securities</b> .....	176
<b>R:131</b> It is recommended the new statute provide WorkCover WA with express authority to:	
i) draw on securities given by a self insurer where the self insurer cannot meet the cost of payments due under the statute;	
ii) manage claims of a default self insurer and exercise its powers through an agent. ....	176
<b>Licensing of insurers</b> .....	178
<b>R:132</b> It is recommended the new statute introduce the term 'licensed insurer' to replace the term 'approved insurer'. ....	178

<b>R:133</b> It is recommended the new statute empower WorkCover WA to license insurers. ....	178
<b>Conditions on licensed insurers</b> .....	178
<b>R:134</b> It is recommended the new statute empower WorkCover WA to impose conditions on licensed insurers.....	178
<b>Insurer performance monitoring</b> .....	178
<b>R:135</b> It is recommended the new statute provide WorkCover WA with express authority to monitor whether an insurer complies with licence approval criteria and conditions. ....	178
<b>Insurer to act on behalf of employer</b> .....	179
<b>R:136</b> It is recommended the new statute clearly identify the provisions where a reference to an employer includes a reference to an insurer. ....	179
<b>Request for insurance – obligation to quote</b> .....	180
<b>R:137</b> It is recommended the new statute oblige insurers to provide a quote on the premium likely to be charged, if requested by an employer.....	180
<b>Specialised insurers</b> .....	180
<b>R:138</b> It is recommended the new statute empower WorkCover WA to apply conditions on insurer licences, such that the insurer is only required to insure employers of a specified class. ....	180
<b>Approved insurer – requirement to provide insurance</b> .....	182
<b>R:139</b> It is recommended an insurance indemnity cover all ‘workers’ employed or engaged by the employer irrespective of any omission by the employer when effecting or renewing a policy of insurance. ....	182
<b>Burning cost policies</b> .....	185
<b>R:140</b> It is recommended the new statute recognise burning cost policies (i.e. policies with an extended period and alternative methods for calculating premium). ....	185
<b>R:141</b> It is recommended the new statute clarify burning cost policies are optional and must not be used by insurers as a compulsory form of policy - their use and the amount of premium payable must be negotiated between the employer and insurer. ....	185
<b>R:142</b> It is recommended the premium appeal mechanism not apply to burning cost policies.....	185
<b>R:143</b> It is recommended the standard employer indemnity terms and conditions apply to burning cost policies.....	185
<b>R:144</b> It is recommended the new statute provide for regulations to set out any limits, controls, terms or conditions applicable to burning cost policies, if required. ....	185

<b>R:145</b> It is recommended the requirement to provide an annual statement of remuneration will apply to all employers including those who negotiate burning cost policies.....	185
<b>Lapsing of policies</b> .....	187
<b>R:146</b> It is recommended the new statute define when a policy has lapsed. ....	187
<b>R:147</b> It is recommended the new statute clarify an insurer is on risk and must indemnify an employer for up to 7 days from the time WorkCover WA receives a lapsed policy notice by the insurer.....	187
<b>R:148</b> It is recommended WorkCover WA approve the form and manner in which the lapsed policy notice is to be given. ....	187
<b>R:149</b> It is recommended the new statute make clear a policy of insurance is not cancelled by virtue of having lapsed. ....	187
<b>Cancellation of policies</b> .....	188
<b>R:150</b> It is recommended the new statute enable WorkCover WA to permit an insurer to cancel a policy of insurance for non payment of premium where: i) the insurer has given reasonable notice to the employer about the amount due; ii) the premium has remained unpaid for a prescribed period. ....	188
<b>Regulation of policy of insurance</b> .....	190
<b>R:151</b> It is recommended all terms and conditions of standard employer indemnity policies be reviewed and prescribed by regulations including the form of the policy. ....	190
<b>R:152</b> It is recommended the new statute enable WorkCover WA to approve, limit or modify policy endorsements or extensions by regulation.....	190
<b>Insurance Commission and public authorities</b> .....	193
<b>R:153</b> It is recommended s44 of the <i>Insurance Commission of Western Australia Act 1986</i> , in relation to the self insurance status of public authorities, be repealed. ....	193
<b>R:154</b> It is recommended the new statute: i) deem ICWA a licensed insurer in respect of workers' compensation obligations of public authorities; ii) deem public authorities as individual employers. ....	193
<b>R:155</b> It is recommended the new statute preserve ICWA's government fund and premium methodology relevant to workers' compensation insurance arrangements for public authorities. ....	193
<b>Mining employers – insurance obligations</b> .....	195
<b>R:156</b> It is recommended the existing insurance regime for workers' compensation liabilities of mining employers be discontinued. ....	195

<b>R:157</b> It is recommended mining employers be required to insure asbestos liabilities with approved workers' compensation insurers under standard insurance policies. ....	195
<b>R:158</b> It is recommended the new statute require approved insurers to indemnify mining employers for asbestos diseases from a proclaimed date. ....	195
<b>Acts of terrorism</b> .....	198
<b>R:159</b> It is recommended the <i>Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001</i> is repealed. ....	198
<b>R:160</b> It is recommended relevant provisions of the <i>Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001</i> are integrated in the new statute with the following amendments: i) the sunset clause is repealed ii) the statutory definition of 'act of terrorism' be based on the Commonwealth's <i>Criminal Code Act 1995</i> , modified to ensure application to personal injury; iii) Ministerial declaration is the sole trigger to activate acts of terrorism arrangements; iv) contribution agreements between WorkCover WA and insurers/self insurers be abolished. Insurer/self-insurer participation in the scheme will be automatic and compulsory with relevant provisions from agreements carried over to regulations; v) to account for changing market dynamics, the apportionment of liability for insurer and self-insurers will be calculated at the time of the event with annual reassessments to occur annually thereafter; vi) the collective liability cap for insurers and self insurers be increased from \$25 million to \$100 million per terrorist event; vii) the 90 day time limit for making a claim will be extended to 12 months, in line with any other claim for compensation; viii) the present exclusion regarding common law liabilities relating to terrorism claims be maintained. ....	198
<b>Repeal of <i>Employers' Indemnity Policies (Premium Rates) Act 1990</i></b> .....	199
<b>R:161</b> It is recommended the <i>Employers' Indemnity Policies (Premium Rates) Act 1990</i> be repealed. ....	199
<b><u>PART 6 - DISPUTE RESOLUTION</u></b>	
<b>Registered agents</b> .....	209
<b>R:162</b> It is recommended the regulatory regime for registered agents be discontinued. ....	209
<b>R:163</b> It is recommended independent registered agents be transitioned out of the scheme over a 2 year period from a date set in the new statute. ....	209



## **PART 7 - COMMON LAW**

**Abolition of termination day** ..... 214

**R:164** It is recommended the termination day regime be discontinued. .... 214

**Election to retain the right to seek damages** ..... 215

**R:165** It is recommended a worker's whole person impairment must be certified by an Approved Medical Specialist in order for the Director to record the degree of impairment for the purpose of electing to pursue common law damages..... 215

**Commencement of proceedings**..... 217

**R:166** It is recommended the new statute require the common law threshold and procedural requirements be met in relation to an injury prior to the commencement of proceedings for damages. .... 217

## **PART 8 - SCHEME REGULATION AND ADMINISTRATION**

**Information management** ..... 222

**R:167** It is recommended the new statute clearly outline:  
i) requirements for the provision of information to WorkCover WA;  
ii) the circumstances where WorkCover WA may release information. .... 222

**Penalties**..... 224

**R:168** It is recommended the fines in the new statute be based on the reviewed amounts contained in Appendix 3 of this report. .... 224

**R:169** It is recommended a penalty unit system be introduced for all offences which includes automatic annual indexation. .... 224

**Infringement notice time frame**..... 224

**R:170** It is recommended the new statute enable infringement notices to be given within 24 months after the offence is believed to have been committed..... 224

## **PART 9 - MISCELLANEOUS**

**Regulation making powers** ..... **Error! Bookmark not defined.**

**R:171** It is recommended regulation making powers currently be located in the relevant Parts of the new statute to which they relate. .... 225



## Legislative structure and rewrite

### The current Act

85. Since its introduction in 1981 the Act has been subject to 23 amendment Acts specific to workers' compensation and a further 39 consequential amendments from other statutes.
86. Issues with the structure of the Act include:
  - a lack of coherence arising from the illogical grouping of unrelated concepts;
  - scattering of related provisions throughout the Act;
  - highly prescriptive provisions making it difficult to adapt to changing circumstances or conditions;
  - some provisions are drafted in a style that is difficult for both lay persons and experts to understand e.g. definition of worker;
  - the significant body of case law which must be read in conjunction with the Act to understand important obligations and processes;
  - anomalies between provisions arising from successive amendments to the Act;
  - the format and numbering of sections which can be counterintuitive;
  - spent or obsolete provisions.
87. The complexity of the legislation is a source of confusion and frustration for scheme participants.
88. It is a fundamental requirement for the statute to set out the rules that govern the scheme in a way that is comprehensive, and readily understood by scheme participants.

### Structure of the new statute

89. The Discussion Paper proposed the Act is repealed and replaced with a new statute which reorders and locates related provisions together in a Part structure that aligns with the practical operation of the scheme.
90. Another key issue is the extent to which the existing provisions of the Act should be redrafted to incorporate contemporary language and drafting conventions. The Act compares unfavourably to the 'modern' workers' compensation legislation in some other jurisdictions which is drafted in accordance with plain language principles.

91. The Discussion Paper proposed the following principles should guide the restructure and redrafting of the Act:
- restructured and reordered provisions in a logical sequence commencing with the most fundamental issues;
  - renumbered provisions to remove the significant use of letter references after section numbers in many parts of the Act;
  - use of plain language;
  - use of aids to understanding and navigation, including objectives provisions, examples, tables, notices to some sections with explanations and cross references to identify linkages within and facilitate navigation through the Act;
  - consistency of key terms - the terms 'liability', 'incapacity' and 'injury' are examples of terms which will be considered in the drafting of the new statute to ensure clarity and consistency of usage;
  - provisions to accommodate future or changing circumstances through:
    - a more efficient use of subsidiary legislation;
    - provisions enabling delegated powers for performing administrative functions under the Act;
  - a mandatory review clause to ensure the currency of the statute.

### Stakeholder submissions

92. There is strong stakeholder support for repealing and redrafting a new statute including the indicative structure proposed in WorkCover WA's Discussion Paper.
93. As part of the consultation process a small number of stakeholders indicated the risks of redrafting legislation generally and the potential for unintended consequences. This was not expressed as lack of support for a redrafted Act but a view the exercise should be approached carefully and in consultation with stakeholders on the final form of the legislation before it is considered by Parliament.

### Recommendation

94. WorkCover WA acknowledges there are risks associated with undertaking a full redraft of the legislation but believes it is timely to adopt a strategic view. While structural changes would go some way to improving accessibility of the legislation, maintaining the current outdated and complex language would limit the effectiveness of the legislation in the long term.

95. Almost all recommendations of this review are intended to address the following problem areas:
- uncertainty in meaning or application of the current legislative arrangements;
  - inconsistencies in terms or provisions with other parts of the statute;
  - ineffective and obsolete provisions;
  - provisions which are an incomplete statement of the law or require further clarity;
  - deficiencies in processes or procedures;
  - lack of flexibility in the Act for use of subsidiary legislation to effect changes in process and procedures.
96. A mandatory review clause will ensure the statute remains contemporary and reviewed against its objectives.

**Rewrite of the Act**

- R:1** It is recommended the Act be repealed and replaced with a new statute.
- R:2** It is recommended the structure of the new statute be based on the outline at Appendix 1.
- R:3** It is recommended the new statute be redrafted with the objective of introducing plain language and contemporary drafting conventions.
- R:4** It is recommended the new statute incorporate the amendments proposed in subsequent parts of this report whilst preserving, to the extent possible, the intent of other provisions of the Act.
- R:5** It is recommended the new statute include a mandatory review clause to ensure formal review of its operation every 5 years.



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## Part 1 – Preliminary

### General

97. The Preliminary Part of the new statute will establish the commencement date and purposes of the legislation. Whole of statute issues including defined terms, and application to certain employment situations will also be covered.

### Proposed Part structure

98. The recommended high level structure of the Part is:
- General
    - Short title
    - Commencement
    - Purposes
  - Application of the Act
    - Application of the Act generally
    - Terms used
    - Local governments and other authorities
    - Work for private householders
    - Religious workers
    - Working directors
    - Sporting contestants
    - Jockeys
    - Workers employed by crown
    - Crew of fishing vessel
    - Overseas workers
  - Employment connection with the State
99. The key changes recommended are:
- some reordering of provisions;
  - replacement of the current three part definition of ‘worker’ with the definition of ‘employee’ for PAYG tax purposes under the *Income Tax Assessment Act 1953* (Cth);

- amendment of the definition of injury to exclude psychological injuries arising from ‘reasonable administrative action’ taken by an employer in respect of a worker’s employment;
  - consolidation of provisions relating to religious workers (‘clergymen’);
  - enabling access to the scheme for public company directors on the same terms as other ‘working directors’;
  - incorporation of existing state of connection (cross border) provisions from the current Compensation Part;
  - addressing coverage for workers engaged outside of Australia for extended periods;
  - discontinuing outdated provisions related to maritime employment, tributers and pre 1977 injuries.
100. No changes are proposed in relation to jockeys, crews of fishing vessels, sporting contestants or working directors (other than inclusion of public company directors and clarification of earnings).

## Definition of worker

101. It is a principle of workers' compensation schemes that compensation is only payable to persons defined as a 'worker'. A clear definition of 'worker' is a fundamental threshold requirement for claimants seeking access to entitlements and to employers in ensuring they have the appropriate level of insurance.
102. Lack of clarity in the current definition in the Act makes it difficult for employers and workers to assess workers' compensation coverage and liability at the commencement of their employment arrangement, particularly in relation to contractors.
103. Knowledge of coverage is important for both employers and workers. Employers need to ensure insurance is in place for all 'workers' as defined, and the correct premiums are paid. Workers need to know whether they are covered by the scheme or have a personal insurance responsibility for any workplace injury they may suffer.
104. The current core definition of 'worker' is a complex 242 word statement that embodies:
  - concepts such as contract of service/contract for service;
  - persons covered by industrial awards or agreements;
  - various specific employment arrangements are either included or excluded.
105. The first part of the definition of worker, the so-called 'primary' definition, predicates the existence of a common law contract of service between worker and employer (historically referred to as a relationship of master and servant). Most employment arrangements are clear cut and the existence of a contract of service is obvious. However, the engagement of contractors and the manner in which parties structure their contractual arrangements can pose challenges. The totality of the relationship between the parties must be considered in these circumstances.
106. The second part of the definition of worker (the 'extended definition') covers sub-contractors and allows for a person who would otherwise be classified as an independent contractor to be held to be a worker by reason of the fact their remuneration is in substance for their personal manual labour or services. The extended definition of worker is a source of confusion for workers and employers about their legal rights and obligations and is difficult to apply to contemporary work arrangements.
107. The third part includes "...any person to whose service any industrial award or industrial agreement applies." The third part of the definition has limited application as persons covered by an award or agreement ordinarily work pursuant to a contract of service.

108. WorkCover WA does not believe the current definition of worker and associated case law is sufficiently clear (particularly in relation to contractors under the extended definition). One of the biggest problems is the current extended definition (contract for service) as neither an employer nor a worker can be sure in advance of a claim whether they are covered or not.
109. A three step process is involved in determining whether someone is 'remunerated in substance for personal manual labour or services' under the extended definition:
- The first step is to determine whether the contractor is being remunerated for personal manual labour alone.
  - If that question is answered in the negative then findings must be made as to the extent to which the contractor is being remunerated for personal manual labour or services and the extent to which the remuneration is a return for other matters. Relevant considerations are the amounts paid to the contractor and how those amounts are disbursed, overheads, the engagement of other labour, the provision of tools and equipment etc.
  - The third step requires a judgment to be made as to whether the remuneration, overall, is 'in substance' for the personal manual labour or service provided.<sup>1</sup>
110. It is very difficult for both contractors and those who engage them to apply the legal principles above. It is an issue that can only be resolved retrospectively. This is particularly problematic in the building and construction industry where contractors are more likely to work with many businesses and regularly change their status– from self employed to potential coverage under the Act. The words 'contract for service', 'purpose of the other person's trade or business' 'manual labour', and 'in substance' have all been subject to interpretation by the courts.
111. Indeed an arbitrator summarising all the authorities in a disputed matter in 2007 concluded that "the meaning to be given to the extended definition of worker is quite settled although its application to particular cases is often difficult." A definition that is difficult to apply is not useful for describing access to the scheme and an employer's mandatory insurance obligations.

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<sup>1</sup> *Summit Homes v Lucev* (1996) 16 WAR 566.



## The results test

112. A new definition of worker was proposed in the Discussion Paper based on a 'results test' which was seen as a more contemporary and familiar test for distinguishing workers and independent contractors.
113. In jurisdictions using a results test, a person who works under a contract or agreement is classified as a 'worker' unless the person meets the results test or the person performing the work has a personal services business determination in effect issued pursuant to the Commonwealth *Income Tax Assessment Act 1997*. A personal services business determination is also based on the results test.
114. The three elements of the results test are:
- the person performing the work is paid to achieve a specific result or outcome;
  - the person performing the work has to supply the plant or equipment or tools of trade needed to perform the work;
  - the person is, or would be, liable for the cost of rectifying any defect in the work performed.

## Stakeholder submissions

115. Stakeholders are divided over the proposal to replace the definition of worker with the 'results test'. Feedback generally falls into the following categories:
- support for the results test – based on the view the current definition is complex and the results test is a simpler and accepted test for distinguishing between employees and contractors;
  - reservations with the results test in providing certainty as the first limb 'paid to achieve a result' has been the source of litigation in jurisdictions that have adopted it;
  - retention of the current definition of worker – either on the basis the legislation and case law is sufficiently clear for most employment arrangements or some trepidation about the use of a new unfamiliar test;
  - support for the PAYG test as the basis for coverage under the scheme – this reflects a view that PAYG is the clearest test for distinguishing between employees and contractors and would align to a definition that is well understood by employers and contractors.
116. It is important any definition provides certainty of coverage at the commencement of the employment arrangement.

117. WorkCover WA accepts the concerns in relation to the use of the ‘results test’. The uncertainty in relation to the first limb of the test might be minimised by amendments to clarify the meaning given to ‘paid to achieve a result’. Such action is not recommended as it would result in the same test being given a different meaning for taxation and workers’ compensation purposes, potentially causing confusion for workers and business alike.

### Recommendation

118. After consideration of submissions and discussions with stakeholders, WorkCover WA is of the view that the definition of worker in the new statute should be aligned with the definition of ‘employee’ for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953*.
119. The primary and extended definition of ‘worker’ would be replaced with the following:
- a person who works under a contract and, in relation to that work, is an employee for the purpose of assessment for PAYG withholding under the Taxation Administration Act 1953 (Cth), schedule 1, part 2-5.*
120. This applies to a person for whom PAYG tax instalments are required or would be required to be withheld by their employer.
121. The PAYG approach provides for a clearer distinction between employees and contractors than the extended definition or the results test. This distinction is summarised in Table 1.
122. By aligning to the well established definition used by the ATO, it will be easier for employers and workers to know who is covered by the scheme. All businesses already need to determine the taxation status of individuals they engage and aligning to the ATO definition will make it easier for employers and workers to apply one definition for tax and workers’ compensation purposes.
123. Workers who work as employees under a contract of service would not be affected by the change. The main impact will be in relation to contractors engaged under a contract for services. Table 2 summarises how the PAYG and current extended definition would apply to individual contractors.
124. Many individual contractors who meet the extended definition are also likely to meet the definition of employee under the PAYG method. These include contractors with or without an ABN who provide personal manual labour or service to one or more businesses (rather than supply others’ labour), provide some tools and equipment to perform their work, and are paid by the hour or at piece rates.

125. Under the PAYG method the fact the person holds an ABN does not preclude them from being an employee. However, the PAYG method is likely to limit cover where the contractor can sub-contract or delegate some of the work to others, the contractor works for a fixed price up front, or operates in a partnership. Under the PAYG definition a worker can only ever be an individual. This means that if a business engages a company, trust or partnership, then the person cannot be an employee.
126. One of the potential criticisms of the PAYG approach is that it is open to 'sham contracting'. Both the ATO and Fair Work Ombudsman have increased reporting and compliance activities with businesses with an ABN in recent years. There is also no intention to repeal the 'avoidance arrangement' provisions in s175AA which apply to workers engaged through a company structure to provide similar services as an employee.
127. Existing deemed workers (jockeys, workers lent or let on hire, working directors) and exclusions (sporting contestants) would continue as standalone provisions in the new statute.
128. Casual workers will continue to be covered by the scheme although the new statute will clarify the meaning of 'casual' in line with decisions of the Full Bench of the Fair Work Commission regarding the meaning of "casual employee" under the *Fair Work Act 2009* (Cth).
129. To address any issues regarding the status of particular employment arrangements, a new regulation making power is recommended. The new power will enable regulations to include or exclude from the definition of worker particular arrangements under which a person works for another in prescribed work or work of a prescribed class.
130. The regulation making power is intended to clarify the treatment of novel arrangements where it is unclear whether the arrangements are captured by the PAYG assessment. Flexibility is also needed to expressly include or exclude particular arrangements, such as contracts of bailment (which are expressly excluded in some jurisdictions), or work undertaken by carers to persons with a disability (see next section).

**Definition of worker**

- R:6** It is recommended the definition of 'worker' in the new statute be based on the definition of an 'employee' for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953* (Cth).
- R:7** It is recommended the new statute authorise the making of regulations to include or exclude from the definition of worker particular arrangements under which a person works for another in prescribed work or work of a prescribed class.
- R:8** It is recommended provisions relating to casual workers, police, personal representatives and dependants of deceased workers be structured as separate subsections within the definition of worker.

**Table 1 - PAYG distinction between employee and contractor**

Employee Indicators	Contractor Indicators
The worker cannot sub-contract the work – they cannot pay someone else to do the work	The contractor is free to pay someone else (sub-contract) to do the work
The worker is paid hourly for the time worked, piece work or a commission	The contractor is paid for a result achieved based on a quote they provided
The worker does not provide all or most of the tools, equipment and other assets required to complete the work, or they do provide all or most but receive an allowance for this	The contractor provides all or most of the tools, equipment and other assets required to complete the work and does not receive an allowance for this
The worker is not legally liable for the cost of rectifying any defects	The contractor is legally responsible for their work and liable for the cost of rectifying defects
The employer has the right to direct the way in which the worker performs their work	The contractor has the freedom in the way the work is done subject to the specific terms of any contract or agreement
The worker is not operating independently from the employer’s business. They work within and are considered part of the employer’s business	The contractor is operating their own business independently from the employer. The worker is free to accept or refuse additional work

**Table 2 - Impact on contractors if PAYG adopted**

Type of contractor	PAYG	Current extended definition of worker
Individuals providing substantial plant / heavy machinery (truck drivers, earthmoving machinery).	Not Covered	Not Covered. If remunerated not just for personal manual labour but for provision of significant materials, equipment.
Individuals who are or have specifically written in their contract (as long as the contract accurately reflects the true working arrangement) that they can subcontract / employ others to do the job.	Not Covered	Unlikely to be covered if person is providing not only his or her own labour but also that of others - will depend on facts of the engagement.
Individuals who quote for jobs (provides upfront total price for the job), and provide tools of their trade, and rectify defects at their own expense.	Not Covered	Covered if remuneration is in substance for personal manual labour and amount for tools of trade is comparatively insignificant.
Contracts with partnerships of individuals	Not Covered	Unlikely to be covered if contract is with partnership and the person is providing not only his or her own labour but also that of others.
Individuals (e.g. plasterers, carpenters, tilers, bricklayers, painters, etc) working on an hourly rate or piece work rates and who do not provide all or most of the tools, equipment and other assets required to complete the work.	Covered	Covered

## Particular classes of workers

### Work for private householders

131. The definition of ‘worker’ and case law lacks clarity in relation to liability and insurance requirements for domestic or personal services to private householders.
132. This issue is complicated by the variable arrangements through which a person could be engaged. Employers operating a business and employing workers to provide labour or services to private householders are required to insure them for workers’ compensation (e.g. companies supplying nannies, carers, gardeners, personal trainers). However, private householders also engage persons directly to provide services of a domestic or personal nature. It is much less clear whether an employment relationship exists in these circumstances.
133. Many arrangements involving domestic work are also likely to be of a casual nature. Casual employment is not covered for workers’ compensation purposes unless the work is for the purpose of the employer’s trade or business. Unfortunately there is minimal judicial guidance as to whether a private householder has a liability as an ‘employer’ under the Act or the circumstances under which they are taken to be operating a ‘trade or business’.
134. The Discussion Paper proposed domestic service in a private home be excluded from workers’ compensation liability and insurance requirements unless the person providing the service is employed by someone who is not the owner or occupier.

### Stakeholder submissions

135. The majority of stakeholders support the exclusion of domestic services although some submissions indicate the need for further clarity regarding the description of domestic services and the application to strata companies.
136. An alternative ‘opt in’ arrangement is proposed by one stakeholder while another suggests cover should be available if the amount paid by the householder is above a specific amount (e.g. \$7,500).
137. Cover for carers in the disability services sector is raised as a particular issue due to a concern about the potential removal of workers’ compensation entitlements for carers providing assistance in the family home to people with a disability. The potential impact of shared arrangements under the National Disability Insurance Scheme may also have implications if there is a significant increase in individuals and/ or families directly managing funding and engaging carers for assistance.

## Recommendation

138. WorkCover WA supports the exclusion for domestic work situations to be implemented via regulations given the novel arrangements that currently exist.
139. WorkCover WA acknowledges that workers' compensation insurance is in place for many carers, albeit there are complex funding and contractual arrangements involving the person with a disability, family members, carer, disability service providers, and government agencies.
140. It is understood the preferred position within the disability services sector is for workers' compensation arrangements to be preserved. This can be accommodated under the recommended regulation making power to include or exclude from the definition of worker particular arrangements under which a person works for another in prescribed work or work of a prescribed class. Further consultation with the sector will be required on the particular wording in the development of regulations.

### Work for private householders

**R:9** It is recommended regulations provide a person is not a 'worker' within the meaning of the new statute while the person is engaged in domestic service in a private home unless:

- i) the person is employed by an employer who is not the owner or occupier of the private home; and
- ii) the employer provides the owner or occupier with the services of the person.

**R:10** It is recommended the domestic worker exclusion not apply if the person is engaged to provide care or assistance to a person in prescribed circumstances.

## Public company directors

141. No changes are proposed to the optional insurance arrangements for working directors.
142. In 2005 legislative amendments clarified the status of 'working directors' in the statutory scheme. Working directors require special arrangements due to the potential difficulties in demonstrating the existence of a contract of, or for, service between the company and director. This is particularly the case for sole directors who are engaged in the daily activities of a company.
143. Under s10A a 'working director' is defined as a "...director of a company who executes work for or on behalf of the company and whose earnings as a director are in substance for personal manual labour or services".



144. The cover is not mandatory and the company must apply to an approved workers' compensation insurer to cover their working directors. If this action is not taken any working directors are not covered for any claim made by a working director on the company.
145. Special provisions for working directors were introduced to recognise working directors are often directors of small scale private companies who, in practice, are remunerated in substance for personal manual labour or services. The nature of the remuneration of working directors is similar to other workers under the extended definition of worker. These arrangements were not considered to apply to public company directors, who were specifically excluded.
146. Some stakeholders have questioned the appropriateness of this exclusion as some public company directors provide a comparable level of personal labour or service to the company and should therefore have the same access to the scheme.
147. WorkCover WA supports optional cover for public company directors who otherwise meet the personal manual labour or service test.

### Stakeholder submissions

148. The majority of stakeholders support optional cover for public company directors although two had concerns regarding the implementation challenges where public company directors sit across multiple boards.
149. During the consultation process insurers also discussed the difficulties of calculating weekly payments for working directors generally as many receive complex remuneration packages. Where a director declares no remuneration the Act is unclear as to whether no weekly compensation is payable or whether the minimum weekly payment would apply (minimum weekly earnings under the *Minimum Conditions of Employment Act 1993*).

### Recommendation

150. The issue of public company directors sitting across multiple boards is not an adequate basis for limiting coverage under the Act. Many private company directors also work for more than one employer, as do many workers. The Act already accommodates concurrent employment situations.
151. In relation to directors' remuneration and payment of weekly compensation the Act already requires the earnings of the director to be estimated and verified at policy inception and renewal. The weekly compensation payable refers to the statement provided by the director's company. The Act also sets out the methodology for calculating weekly payments if a statement is not provided.

152. However, it is acknowledged the Act is unclear in relation to whether the minimum weekly payment provisions apply if a statement is provided that declares no earnings. In relation to working directors it is recommended the minimum weekly payment provisions not apply where a statement of earnings has been provided by the director's company.
153. Guidance on what is required to be declared as earnings and the values to be made on certain payments (e.g. fringe benefits, salary sacrificing, and dividends) may also clarify this issue.

#### **Public company directors**

- R:11** It is recommended the new statute provide access to the scheme for public company directors on the same terms, and subject to the same criteria, as other working directors.
- R:12** It is recommended the new statute provide where a statement of earnings is provided by a company in relation to a working director's earnings the minimum weekly payment provisions do not apply.

### **Religious workers**

154. The Act provides special deeming arrangements for Anglican, Baptist and 'other' clergymen. The historical basis for special legislative arrangements for covering ministers of religion (clergy) is due to legal uncertainty about whether:
- the relationship between minister and church is a legal one;
  - a contract of, or for, service exists as required by the Act.
155. The status of religious clergy under the Act requires clarification and streamlining. The following key issues have been identified:
- uncertainty about the legal relationship between church and clergy;
  - inconsistencies in the scope of cover under the Act;
  - issues with the Ministerial declaration process for 'other' clergy.
156. The Discussion Paper proposed that provisions regarding 'religious workers' be consolidated in the new statute and that religious workers who do not otherwise meet the definition of 'worker' may be deemed a worker via a declaration process.

### **Stakeholder submissions**

157. There was no opposition from stakeholders for special deeming arrangements for religious workers.

## Recommendation

158. The recommendations in relation to the definition of worker will assist in clarifying this issue as religious clergy for whom PAYG is applicable will be covered by the scheme. A declaration process is required where there is some doubt or as an opt-in arrangement.
159. WorkCover WA recommends WorkCover WA declare persons within a specified class are 'workers' of a religious organisation or body and are taken to be employed by the person, body or organisation specified in the declaration as the employer. A declaration would only be made at the request of the religious body or organisation.
160. The normal tests applicable under the definition of 'worker' would not apply if a declaration is made. Conversely, the absence of a declaration would not affect the operation of the statute if a person is otherwise a 'worker' as defined in the new statute.
161. The advantages of the proposed approach include:
  - flexibility and freedom of choice for religious bodies and associations to seek clarity via a declaration if there is doubt as to the employment status of religious workers;
  - a declaration can be sought at the request of the governing body or local church. Workers can be nominated specifically or generally (e.g. by position or all members within a specified religious body or organisation);
  - the process does not impose different conditions based on religious denomination;
  - clarification religious workers who otherwise meet the definition of 'worker' under the Act are covered even if a declaration is not made;
  - issues regarding the currency and legal status of religious bodies for which a declaration is made will be addressed by triennial reviews with ability to cancel or amend previous declarations where appropriate.
162. Standard practices currently require, as a precondition to recognising clergy, religious bodies to produce a certificate of incorporation and evidence of their tax exemption as a charitable organisation. This process ensures that the employer is a legal entity and recognised as such under other laws.

### Religious workers

- R:13** It is recommended provisions regarding 'religious workers' be consolidated in the new statute without reference to any particular faith.
- R:14** It is recommended religious workers who do not otherwise meet the definition of 'worker' may be deemed a worker via a declaration process.

## Government workers and nomenclature of the Crown

163. The Act uses both the terms 'Crown' (e.g. in s14 and 304(3)) and 'State' (e.g. in ss94(2a), 164, 165 and 179). It would be preferable if the one term was employed throughout. WorkCover WA will seek advice as part of the drafting of the Bill regarding the most appropriate term.
164. Section 179(4) provides when the employer is the State, notice in respect of an injury under the Act is to be served on the State Solicitor, at Perth, or the manager of the work on which the worker was employed at the time the injury occurred.
165. Section 14(4) states:
- In all claims against the Crown, whether arising out of injuries to workers employed by or under the Crown, or in respect of any other claim under this Act by any other person, proceedings may be taken and prosecuted under this Act by suit against the Attorney General as representing the Crown in his representative capacity and without imposing any personal liability upon the occupant of the office of Attorney General.*
166. The provisions for bringing action against the Attorney General (s14(4)) and serving the State Solicitor's Office (s179(4)(a)) should be amended, as these provisions do not reflect current practice. In practice, claims are made directly on the relevant public authority and administered by the Insurance Commission of Western Australia (ICWA). The requirement to give notice will be removed as part of proposed changes to the claims process.
167. The Discussion Paper proposed a single term (either 'Crown' or 'State') be used to describe the executive government under which public authorities operate. It was also proposed a claim for compensation or proceedings against the Crown / State be made on the relevant public authority by whom the worker was employed or engaged at the time of the injury.

## Stakeholder submissions

168. All stakeholders who made submissions on this issue supported the proposals.



## Recommendation

### **Government workers and references to 'Crown'**

**R:15** It is recommended a single term (either 'Crown' or 'State') be used to describe the executive government under which public authorities operate.

**R:16** It is recommended a claim for compensation or proceedings against the Crown / State be made on the relevant public authority by whom the worker was employed or engaged at the time of the injury.

## Employment connection to Western Australia

169. A consolidated division will be created in the new statute comprising all provisions related to the geographic or territorial (so called 'cross border') application of the Act. It will also include the geographical limits of the application of the statute and machinery provisions relating to determinations of geographical application.
170. In addition to relocation of the cross border provisions, amendments are required to clarify the status of workers working outside of Australia for extended periods.

### Overseas workers

171. There is a lack of clarity in relation to coverage of overseas workers. Legislative amendments in 2004 introduced cross border provisions and repealed s15 of the then *Workers' Compensation and Rehabilitation Act 1981*. The repealed s15 had the effect of excluding cover for workers who had been continuously resident outside the State for a period of more than 24 months at the time the injury occurred.
172. The current cross border provisions are based upon the concept of a 'state of connection' and provide for a series of sequential tests for determining the jurisdiction in which a worker is connected (where the worker 'usually works', is 'usually based' or location of the employer's 'principal place of business').
173. An issue which has arisen is whether the cross border provisions enacted by all states and territories apply beyond Australian borders. Cross border legislative arrangements operate to determine the state of connection between states and territories but there is some doubt about their application to Australian workers working overseas.
174. Some jurisdictions have specific legislative arrangements for overseas workers (Queensland, Victoria and the ACT), in addition to cross border provisions. This arrangement suggests the cross border legislation was intended as a mechanism for dealing with arrangements between and not outside Australian jurisdictions.
175. In any event, the state of connection tests can be problematic to apply in practice where there are intermittent periods of employment overseas or the period exceeds 6 months (in which case the issue of cover needs to be reconsidered).
176. A legislative solution for overseas workers is required which does not rely upon the cross border provisions.

177. The Discussion Paper proposed:

- the new statute include a provision for overseas workers based on an express period of cover for 24 months;
- the express period of cover for overseas workers may be extended by agreement between the employer and insurer.

178. The key elements of the proposed changes were identified in the Discussion Paper as follows:

- an employer employs a worker in the State and the work is done:
  - partly in the State and partly outside the Commonwealth; or
  - totally in some place outside the Commonwealth;
- the injury occurs outside the Commonwealth in circumstances where, if the injury had been suffered in the State, the worker or dependants would be entitled to compensation;
- the worker must have resided in the State and not been continuously resident outside the State for a period of more than 24 months at the time the injury occurred, or any extended period nominated in a policy of insurance;
- compensation will not be payable if the worker or dependant had in any place other than the State received, workers' compensation, obtained a judgement or settlement against the employer or recovered damages in respect of the injury;
- 'employer' will be defined as an employer domiciled or ordinarily resident in the State or who has a place of business in the State or was present in the State at the time of employing the worker;
- cross border tests will not apply to injuries occurring outside the Commonwealth.

### **Stakeholder submissions**

179. There is no objection in the submissions to an express provision and period of cover for overseas workers.

180. Insurers support a 12 month period of cover (rather than 24 months) aligned to employer indemnity insurance policies and reinsurance treaties.

181. Some stakeholders indicate specific guidance should be given to ensure clarity in relation to one or more of the following:

- any exclusions to coverage;
- journey claims outside the State;
- when the workers must have resided in the State;
- the meaning of 'resided' and what evidence is required;



- meaning of present in the State at the time of employing the worker;
  - how 'employed' will be defined for the purpose of working out whether someone was employed in Western Australia.
182. Some stakeholders also suggest further clarity is required in relation to the cross border provisions for work done across states and territories.

### Recommendation

183. In relation to the mandatory period of cover there is no compelling reason to align it to the period of cover in insurance contracts between employers and insurers or reflective of any period in reinsurance arrangements. This would result in coverage under the Act and therefore entitlements being conditional on the specific insurance arrangements effected by employers and insurers.
184. The 24 month period acts as a limitation on cover for workers against a particular employer. An employer's policy will respond if the worker has not been continuously resident outside the State for a period of more than 24 months at the time the injury occurred. If an employer changes insurers during the 24 month period the new insurance policy will respond as it would for any other claim incurred for an injury to the employers' workers after the new policy was affected.
185. If insurers have concerns about potential liabilities for overseas workers this potential risk can be identified by seeking information from the insured in the renewal declaration forms used by insurers.
186. The Discussion Paper proposal for the 24 month period to be extended by agreement will not be progressed as an open ended period of cover is not considered appropriate or workable under current insurance practices.
187. The terms identified by stakeholders as requiring clarification can be addressed as part of the drafting process for the Bill.
188. While there is uncertainty in relation to the cross border provisions for work between states and territories, a legislative solution would require agreement and enactment of new laws in each of the states and territories. There appears to be minimal appetite for legislative changes from other Australian jurisdictions.

#### Overseas workers

**R:17** It is recommended the new statute include a provision for overseas workers based on an express period of cover for 24 months.

## Additional issues raised by stakeholders

### Stress claims – reasonable administrative action

189. Sections 5(1) and 5(4) of the current Act provide a disease caused by stress is excluded from the definition of ‘injury’ under s5(1) if the stress wholly or predominantly arises from the following matters and any action taken by the employer is not unreasonable and harsh:
- the worker’s dismissal, retrenchment, demotion, discipline, transfer or redeployment; and
  - the worker’s not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment; and
  - the worker’s expectation of —
    - a matter; or
    - a decision by the employer in relation to a matter, referred to in paragraph (a) or (b).

### Stakeholder submissions

190. Although the Discussion Paper did not propose any amendment to the definition of ‘injury’ various stakeholders indicate the definition of ‘injury’ requires amendment to exclude stress claims resulting from reasonable administrative action.
191. Submissions cite a growing number of stress claims arising out of circumstances surrounding a worker’s performance. Legal precedent has established the existing s5(4) exclusions do not apply to those claims as there was no discipline or expectation of discipline.

### Recommendation

192. Riskcover data indicates in the public sector alone around 380 stress claims are lodged at a cost of \$17.8 million, many of which relate to general performance management.
193. An amended definition of injury would allow employers to address performance management in a reasonable way in the workplace.
194. WorkCover WA agrees this type of exclusion reflects an appropriate balance between allowing employers to manage the quality of workplace performance and protecting the health of employees. It is also comparable to arrangements in other jurisdictions.

195. The Commonwealth Government's *Safety, Rehabilitation and Compensation Act 1988*, s 5A provides that 'reasonable administrative action' is taken to include the following:
- a reasonable appraisal of the employee's performance;
  - a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
  - a reasonable suspension action in respect of the employee's employment;
  - a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
  - anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);
  - anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.
196. This type of approach integrates many of the current exclusions in s5(4) relating to disciplinary matters whilst also excluding from a compensable injury reasonable actions associated with performance generally which is a feature of effective workplace management.

**Psychological injuries – reasonable administrative action**

**R:18** It is recommended the definition of 'injury' exclude psychological injuries (diseases) arising from 'reasonable administrative action' taken by an employer in respect of a worker's employment.

## Repealed provisions

### Tributers

197. It is recommended the current s7 (and the associated definition in s5(1)) relating to persons engaged as 'tributers' in mining be repealed on the basis the provision is redundant with no persons currently, or likely to be, working on this basis.
198. The Department of Mines and Petroleum (Western Australia) concurs with this view.

### Application to maritime workers

199. The Act makes specific provision for workers on ships. Section 16 of the Act provides for the application of the Act in respect of an injury to a worker employed on a ship where the worker's employment is connected with the State (s20).
200. The provisions currently deal with the following matters:
- service of notice and claim;
  - burial and maintenance expenses;
  - implications of s503 of the UK *Merchant Shipping Act 1894*;
  - timeframes and evidential requirements for commencing claims when a worker is lost at sea with the ship.
201. The Discussion Paper proposed that matters currently covered in s16 are adequately provided for elsewhere in the Act. The historical bases for the specific provisions of s16 are considered to no longer apply and can be repealed. The general claim and entitlement provisions of the Act are considered to be suitable for application to maritime workers and vessel owners. There are no objections from stakeholders to this proposal.
202. It is recommended s16 is repealed.

### Application of Act - pre 1977 claims

Sections 12 and 13 of the Act address the entitlement to compensation for injury or death occurring before 28 November 1977. Both provisions deal with transitional arrangements applicable in 1977 which have no current use and can be repealed.



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## Part 2 – Compensation

### General

203. The Compensation Part of the new statute will establish the statutory compensation entitlements of injured workers along with the processes associated with making, managing and settling claims.

### Proposed Part structure

204. The proposed high level structure of the Part is:

- Liability of employer
- Making a claim
- Compensation entitlements
  - General
  - Weekly payments
  - Medical expenses
  - Other expenses
  - Workplace rehabilitation
- Compensation for specific types of injury and death
  - Permanent impairment
  - Noise induced hearing loss (NIHL)
  - Industrial diseases
  - Specified loss of functions
  - Specified diseases contracted by firefighters
  - Compensation for death
- Claim management
- Settlement of claim

### Key changes

205. The key changes proposed for the compensation elements of the current Act are:

- significant restructuring and reordering of provisions with a number of new subdivisions created;
- removal of distinction between claims for weekly payments and other claims;

- removal of requirement for worker to serve a notice of injury in writing on the employer in addition to making a claim;
- relocation of the entitlement provisions from Schedule 1 to the body of the new statute;
- simplification of the method for calculating weekly earnings for all workers;
- revised claim management provisions;
- clarification of the lump sum entitlement for asbestos related diseases and improvements to the claims and assessment processes;
- changes to the framework for NIHL;
- increased lump sum death entitlement and revised legislative framework;
- introduction of a new process for settlement of claims.

## Key terminology

### Compensation and related definitions

206. Provisions relating to compensation entitlements are currently located separately throughout the Act. In addition, the various types of compensation to which an individual worker may be entitled are not clearly and expressly defined.
207. The Discussion Paper made a number of proposals with the aim of consolidating provisions and defining relevant terms. The proposals included:
- consolidating all compensation entitlements in the same Part of the new statute;
  - clarifying the definition of the ‘prescribed amount’ and locating the annual indexation methodology in regulations;
  - defining ‘compensation’;
  - defining ‘medical expenses’;
  - defining ‘other expenses’.

### Stakeholder submissions

208. Stakeholder submissions support the consolidation of provisions relating to compensation entitlements and use of relevant definitions.
209. One stakeholder submits the annual indexation methodology for the prescribed amount should be set out in the statute rather than regulations.

### Recommendation

210. The term ‘compensation’ will be broadly defined to facilitate consistency throughout the Act. The new statute will continue to set out threshold requirements for entitlements to sub categories of compensation. Weekly payments, for example, will only be payable where a worker has an incapacity for work.
211. WorkCover WA’s preference is for indexation methodologies to be located in regulations. This is to address historical problems where the indexation methodology is affected by external changes. For example, the Australian Bureau of Statistics recently changed its reporting period for ‘average weekly earnings’ which was hard coded in the Act. There is no intention to change the indexation methods but flexibility is required to address these circumstances.





### Compensation generally

**R:19** It is recommended the provisions relating to compensation entitlements be consolidated in the Compensation Part of the new statute.

**R:20** It is recommended the new statute define the following key terms:

- i) prescribed amount;
- ii) compensation;
- iii) medical expenses;
- iv) other expenses.

**R:21** It is recommended the annual indexation methodology for the prescribed amount be located in regulations.

## Making a claim

### Requirement to give notice

212. Requirements for making a claim are currently located in two parts of the Act. The Discussion Paper proposed that all requirements for making a claim be located in the Compensation Part of the new statute. It is understood employers or insurers do not currently require the serving of the s178 notice prior to accepting a claim. In practice notice of injury and lodgement of claims occur contemporaneously in most instances.
213. In the interests of simplifying the claim process WorkCover WA proposed the requirement for a worker to serve notice of an injury on an employer be discontinued.

### Stakeholder Submissions

214. The proposal to locate all claim requirements in the Compensation Part of the Act is supported by stakeholders.
215. The proposal in relation to notice of injury is generally supported. However, two submissions are concerned that removal of the requirement to serve notice of injury would compromise opportunities for appropriate medical and injury management to occur.

### Recommendation

216. WorkCover WA acknowledges the concerns expressed in relation to medical and injury management. However, employers are able to manage the notification process in their workplace through other methods.
217. It is recommended that the serving of notice of injury no longer be required under the new statute. The current requirement to make a claim within 12 months of the injury will remain.

#### Requirement to give notice

**R:22** It is recommended the requirement for a worker to serve written notice of injury on an employer be discontinued.

### Claim process for insurers and self insurers

218. The claim process in the Act provides different time frames for responses to claims from insurers and self insurers. The Discussion Paper proposed a consistent claim process for insurers and self insurers.

## Stakeholder Submissions

219. The proposal that a consistent claim process apply for insurers and self insurers is supported. Self Insurer's Association of Western Australia (SIAWA) submits the needs of self insurers should be reflected in the timeframes.

## Recommendation

220. WorkCover WA is not intending to decrease the current 17 day timeframe for liability decisions available to self insurers.
221. It is recommended, for consistency, timeframes for decision making by insurers and self insurers be aligned.

### Claim process

**R:23** It is recommended the new statute establish a consistent claim process, applicable to both insurers and self insurers.

## Consistent claim process

222. While the Act currently makes provision for the claiming of compensation for incapacity by way of weekly payments there is no similar regime for the claiming and payment of medical and ancillary expenses when there is no incapacity for work. Approximately 55% of claims within the WA scheme are for medical or other expenses only.
223. In keeping with the Legislative Review 2009 it was proposed the claim process for medical expenses be integrated with the process for claiming weekly payments and be generically referred to as a 'claim for compensation'.
224. The threshold decision in relation to all claims for compensation is whether a liability arises under the Act. That is, whether the individual making the claim:
- is a worker for the purposes of the Act;
  - has suffered a compensable injury;
  - has medical certificates or medical evidence to support a claim for entitlements.
225. The Discussion Paper also proposed the new statute include a regulation making power to prescribe the processes for making a claim in regulations. This will enable the processes to be refined as required.

## Stakeholder Submissions

226. The introduction of a single claim process for incapacity and/or medical expenses is widely supported. Stakeholders submit, however:
- the Act should provide for a determination to be made on liability for medical expenses only or liability for medical and weekly payments;
  - once a claim for medical expenses has been accepted the period for determining a subsequent claim for weekly payments should be 7 days.
227. The proposal to include a regulation making power to prescribe the process for making a claim is generally supported. The Law Society of Western Australia (Law Society) is of the view the claim process should be set out in the statute.

## Recommendation

228. A single claim process integrating weekly compensation and medical expenses is recommended as:
- decisions on claims, whether for weekly payments or medical expenses or both, require consideration of the threshold question of whether a liability to pay compensation arises;
  - a claim form and medical certificate are required for all types of claims;
  - timeframes for responses to medical expenses claims need to be clearly established.
229. Where a worker makes a claim for compensation and a subsequent incapacity develops the worker will be required to submit a progress medical certificate to receive weekly payments for any loss of income and the employer/ insurer will be required to accept or deny payment of the entitlement (if there is a loss of income) within 14 days.
230. While key elements and principles of the claim process (e.g. obligations of workers, employers, insurers) will be set out in the statute, the regulation making power provides flexibility for matters of process to be dealt with more efficiently.

### Consistent claim process

- R:24** It is recommended the new statute introduce a single claim process to accommodate both weekly payments for incapacity and/or medical expenses.
- R:25** It is recommended regulations prescribe the process for making a claim.

## Pended claims

231. Claims are 'pended' where a decision on liability cannot be made within the timeframes specified in the Act for insurers and self insurers.
232. The extended period over which a number of pended claims remain unresolved is an ongoing cause of concern to WorkCover WA.
233. WorkCover WA statistics indicate that 88% of lost time claims pended are eventually accepted. Of the outstanding 12%, half are paid without prejudice. On these figures difficulties experienced by workers who are required to wait for extended periods for payment do not seem warranted when in the majority of cases the claims are accepted in one form or another.
234. Initially the Discussion Paper proposed a fortnightly notification requirement for insurers and self insurers where a decision on liability cannot be made within the prescribed timeframe for accepting or disputing the claim. This approach was intended to ensure decisions on liability were not delayed.
235. Initial feedback from stakeholders indicated the notification requirements would not address the problem efficiently. WorkCover WA gave further consideration to alternative approaches including those in other privately underwritten schemes where provisional payments are available when a claim is pended.
236. A further proposal was distributed to stakeholders by WorkCover WA as follows:
- where no decision is made on liability within the prescribed timeframe (i.e. pended), provisional payments are to commence;
  - provisional payments will not be construed as an admission of liability;
  - where a decision on liability is not made within 90 days of the claim being made liability will be deemed accepted for the purposes of the Act;
  - nothing will prevent an insurer or self insurer disputing the claim at any time after a provisional payment is made;
  - the worker will not be required to pay back provisional payments in the event liability is not established unless the claim is fraudulent.

## Stakeholder submissions

237. There are a number of concerns expressed by insurers, the National Insurance Brokers Association of Australia (NIBA) and the Chamber of Commerce and Industry Western Australia (CCI) namely:
- potential increase in number of claims denied or disputed;
  - increased claim costs (of particular concern in the public sector);
  - the proposal does not reflect complexity of determining liability for some claims;
  - lack of requirement for non entitled worker to repay;
  - potential for fraudulent claims.
238. ICWA strongly opposes the proposal noting they only pended when information was insufficient and further investigations were required.
239. UnionsWA strongly supports the proposal noting it would remove incentives to unfairly pend and would generally improve the experience of workers in the workers' compensation system.
240. QBE Insurance (Australia) Limited (QBE) suggests the NSW model of 'provisional liability' and 'reasonable excuse' could be considered. QBE also raises the issue of an insurer recovering provisional payments in the event another employer or insurer was found to be liable for the claim.
241. The Insurance Council of Australia (ICA) proposes an alternative:
- payments of medical expenses up to 5% of the prescribed amount and rehabilitation expenses up to 15% of the prescribed amount can be made provisionally from the date the worker lodges their claim on the employer. This will focus costs on treatment and early return to work and may limit the exposure to weekly payments;
  - provisional payments of weekly payments do not commence until 60 days after the worker has lodged the claim on the employer;
  - provisional payments for weekly payments only cease when the employer formally declines liability or an order is made by an arbitrator;
  - nothing would prevent either the worker or employer/insurer from lodging an application to determine liability 19 days after the claim has been made on the employer.

## Recommendation

242. WorkCover WA acknowledges the potential for some claims to be denied or disputed at the outset. However, the concern of stakeholders must be viewed in the context of current experience which shows the significant majority of pended claims are accepted and receive payments in some form.
243. WorkCover WA does not support provisions requiring the worker to repay provisional payments where liability is eventually denied. This would be administratively complex and, in WorkCover WA's view, penalise workers who make claims in good faith.
244. There are existing legislative arrangements and claim management strategies to deal with fraud and experience indicates the level of fraudulent claims in the scheme is negligible.
245. WorkCover WA considered the merits of other jurisdictions where provisional payments are made and the ICA's proposal and recommends:
- an extension of the timeframe before provisional payments commence (additional 14 days from when the notice is first given that a decision cannot be made). This means provisional payments would not commence for up to 28 days from when the insurer first receives the claim from the employer;
  - the capping of medical expenses for pended claims at \$5,000;
  - regulations be amended to permit an employer to require a worker to submit to an examination by a doctor of the employer's choice within a month of issue of a First Medical Certificate. This will remove a current barrier and facilitate timely medical review of complex claims.
246. The QBE proposal for provisional payments to be recovered where some other employer or insurer is found liable is supported (see recommendation 81).

### Pended claims

- R:26** It is recommended the new statute establish a process for pended claims in accordance with the following:
- i) payment of weekly earnings and medical expenses commence within 14 days after notice is given that an insurer is unable to make a decision on liability within the required timeframe;
  - ii) payment of medical expenses of up to \$5,000 inclusive of amounts paid prior to commencement of provisional payments;
  - iii) all payments are without prejudice;
  - iv) an insurer be permitted to require a worker to attend at a doctor of the insurer's choice within a month of issue of a First Certificate of Capacity.

## Recurrence

247. Recommendation 17 of the Legislative Review 2009 proposed amendment to regulations to clarify the claims procedure for recurrence and to prescribe a recurrence form.
248. Identifying an injury as a recurrence can be complex. In view of the potential for complexity and proposals for amendment of the claim process, WorkCover WA has given further consideration to the need for clarity around a claim for a recurrence.
249. Given the potential complexity of identifying when a claim is a recurrence of a previous injury the Discussion Paper proposed certain 'flags' be introduced in the claim form and medical certificates to highlight to an employer or insurer there may be a recurrence of injury. The proposed flags were:
- the claim form be amended to include additional information that will alert the employer to the issue of recurrence;
  - the certificate of capacity will be amended to provide for the certifying practitioner to make comment on the issue of recurrence.

## Submissions

250. The proposal is generally supported. WorkCover WA has recently progressed amendments to regulations which replace the existing medical certificates. The new certificate of capacity includes an option for the medical practitioner to indicate they consider the injury to be a recurrence.



## Recommendation

251. It is acknowledged the question of whether an injury is a recurrence is complex and not appropriate for the medical practitioner to resolve at the time of issuing a certificate. However, the capacity for the claim form and medical certificate to collect information relevant to any recurrence may be useful.

### Recurrence

**R:27** It is recommended the claim form and certificates of capacity be amended to include collection of information in relation to the question of recurrence.

## Consent authority

252. The current claim form contains two consent authorities which, whilst generally signed by workers, are not compulsory and can be revoked. A failure by a worker to consent to release of relevant medical information to an employer or insurer has the capacity to slow down and in some cases halt the claim process. Revocation of an authority mid claim can have a similar effect.

253. The Discussion Paper proposed the new statute contain a requirement for the worker to authorise collection and release of a worker's personal and sensitive information relevant to a claim. It was further proposed the authorisation would be irrevocable and extend to all relevant medical and other information sources.

## Stakeholder submissions

254. The majority of submissions support the proposals, in some cases strongly. One stakeholder supports the authority being irrevocable subject to there being adverse consequences for misuse.

255. One submission suggests the statute should set parameters for information to be assessed as relevant before release and expressed a preference for the authority not to be mandatory and irrevocable.

256. The Law Society queried whether the provisions would apply in sexual abuse cases and also queried whether medico legal reports would be captured by the provisions.

## Recommendation

257. The underlying premise of the scheme is compensation for the worker and support of their return to work. Access to information about a worker's condition and progress are fundamental to an employer or insurer's capacity to determine liability and manage a claim. Without exchange of relevant information the functioning of any workers' compensation scheme is impeded.
258. It is WorkCover WA's intent that a worker be required to authorise release of personal information inclusive of sensitive information to the employer or employer's insurer where that information is relevant to the assessment and management of the claim including return to work options.
259. The party from whom information was required would need to satisfy themselves the information was relevant to the worker's claim before releasing it.
260. The authority for the release of information collected by the insurer to other parties would likewise authorise the release of information for the purposes of assessing and managing the claim only.
261. The Act will make it an offence to use information provided under this section for purposes other than those set out above in the absence of client consent.
262. In relation to the Law Society's query in relation to medico legal reports, s70 provides for the release of medico legal reports in any event. Where a matter related to a sexual assault, the release of information would still require assessment as to whether it was relevant to the assessment or management of the claim.
263. A dependant's consent authority will mirror the general consent authority with the incorporation of restrictions on access to human tissue included in both consent authorities.

### Consent authority

**R:28** It is recommended the new statute introduce a mandatory requirement for a worker to provide authority for the collection and release of personal information substantially in the terms of the two authorities already found in the claim form.

**R:29** It is recommended a worker's consent authority be made irrevocable for the life of the claim.

## Compensation entitlements

### Weekly payments

264. There are currently two different systems for calculating weekly payments for workers, with award and non-award based workers being treated differently.
265. The process of calculating weekly payment entitlements for award workers can often be difficult and is borne out through an extensive body of case law. The complexities relate to the need to establish the relevant award rate of pay and the status of 'over award' payments such as allowances and overtime as they apply to individual workers.
266. By comparison, the calculation of earnings for non-award workers is simply based on pre-injury earnings.
267. The complexity and subjectivity of calculating earnings for award workers has been consistently raised with WorkCover WA as an area in the Act that requires attention.
268. To improve certainty and equity in respect of calculating weekly payments, and avoid disputes around this fundamental entitlement, the Discussion Paper proposed all workers' earnings be calculated on the basis of pre-injury earnings, with current Amount Aa retained as a minimum amount for award workers. After release of the Discussion Paper, WorkCover WA revised the proposal by correspondence to stakeholders, proposing all workers' be treated equally regardless of whether their earnings are prescribed by an award. That is, all workers to be subject to a step down in earnings after 13 weeks and the same minimum earnings protection under the *Minimum Conditions of Employment Act 1993*.

### Stakeholder submissions

269. WorkCover WA received 10 submissions on the proposal, the majority of which support the revised proposal.
270. The majority of stakeholders agree the process for calculating earnings is in need of simplification and all workers should be treated equally, including in respect of the step down in earnings which apply after 13 weeks of incapacity. One stakeholder suggests such amendments are urgent.
271. The Law Society opposes the changes on the basis that a significant number of award workers are not currently subject to a step down in earnings and the proposal would subject those workers to the step down.

272. UnionsWA disagrees there is significant complexity in calculating payments and opposes the changes. UnionsWA also comments on the impact of the step down on award workers under the proposal and the potential to "... significantly impact the quality of life for injured workers who will struggle to meet day to day living costs and household payments".
273. While supporting complete alignment for award and non-award workers, the ICA acknowledges the potential impact on award workers. The ICA suggests, if complete alignment is not possible, award workers could be protected by minimum payments based on the base award rate, exclusive of over award payments such as overtime and allowances.
274. Slater & Gordon supports the proposal that all workers' earnings be calculated by reference to pre-injury earnings. However, this is only on the condition the current step downs are removed for all workers. UnionsWA also supports the removal of step downs for all workers.
275. Several submissions also raise the following technical issues:
- date of injury being utilised as the preferred operative date to calculate weekly earnings. This is primarily based on the fact that a worker's injury may impact their earning ability, which could adversely affect their rate of weekly earnings if they are subsequently incapacitated;
  - the process for varying the earnings of a worker lacks clarity.

## Recommendation

### Weekly earnings

276. The intention is to provide clarity and certainty around the calculation of earnings for all workers. The majority of stakeholders accept and support the pre-injury earnings calculation as an appropriate method to achieve this.
277. It is therefore recommended the new statute treat all workers on the same basis, with earnings calculated by reference to pre-injury earnings over a 12 month period.
278. After 13 weeks of incapacity, payments will be reduced to 85% of pre-injury earnings. However, award workers will receive the greater of:
- 85% of pre injury earnings; or
  - the base award rate of pay under the relevant award, exclusive of over award payments such as service payments, allowances and overtime.

279. Award workers whose pre injury earnings comprise more than 15% from over award payments will receive a step down to 85% of pre injury earnings. Award workers not in receipt of significant overtime or service payments will revert to the base award rate of pay.
280. This will remove the complexity and subjectivity of whether particular over award payments are included, but will retain a minimum protection for award based workers who would be disadvantaged by the step down provisions. In practice, this means many award workers will not be subject to any step down in earnings.
281. While some stakeholders suggest all step downs should be removed, there is no intention to remove these provisions. The application of a step down in weekly compensation is a long standing element of workers' compensation schemes across Australia. The step down plays a key role in encouraging workers to return to work. Removing this incentive could result in deterioration in return to work rates and increases in claim costs.
282. Pursuant to stakeholder submissions, WorkCover WA supports the use of date of injury as the relevant date for calculating pre injury earnings.

#### **Variation in weekly payments**

283. Currently, workers whose weekly payments are based on pre-injury earnings (non-award workers) are entitled to have their earnings "...varied from the date and to the extent of any variation the worker would have been entitled to receive in the normal course of his employment". As highlighted by stakeholders, the current provision is vague and likely to cause disputes around what increases a worker "would have been entitled to receive." As all workers will be subject to pre-injury earnings, it is necessary to introduce clarity around variation of weekly earnings.
284. It is recommended the new statute provide a worker is entitled to any changes to their base rate of pay that occurs after the date of injury. This is not to include changes to rates for allowances, overtime, bonuses etc. For example, if a worker's hourly rate of pay increases by 5%, their weekly payments are to be increased by that percentage. The provision will also account for where rate of pay is not an hourly rate.
285. It is acknowledged this is not a perfect representation of the relevant increase, as the pre-injury earnings may include 'over award' components and the percentage increase will in some cases be applied to amounts that are not base earnings only. However, this method is considered a reasonable balance in providing both clarity and fairness. This is the clearest method which will eliminate the complexity of identifying component parts of workers' earnings, which may not always be possible given the pre-injury earnings calculation of weekly payments.

286. It is also intended the new statute will clarify the meaning of 'prescribed by an industrial award'.

#### **Weekly payments**

- R:30** It is recommended all workers' weekly payments be calculated on the basis of their pre-injury earnings over a 12 month period.
- R:31** It is recommended the minimum earnings of workers whose earnings are prescribed by an industrial award be the rate of weekly earnings under the award, exclusive of any over award or service payments, overtime, bonus or allowance.
- R:32** It is recommended a worker's weekly payments be increased commensurate with any percentage increase to their base rate of pay occurring after the date of injury.

### **Entitlement to leave while incapacitated**

287. The Act provisions outlining the interaction between weekly payments and leave entitlements are known to cause confusion amongst stakeholders.
288. The Discussion Paper proposed the general intent of the leave provisions be retained with the language clarified to provide:
- a worker may access accrued leave entitlements while incapacitated;
  - a worker may receive leave entitlements and weekly compensation concurrently;
  - leave cannot be paid in replacement of weekly compensation.

### **Stakeholder submissions**

289. Stakeholders support this proposal and confirm the proposals reflect current practice.
290. One stakeholder submits extended annual leave while incapacitated may interfere with injury management and proposes the Act enable a worker to consent to temporary cessation of weekly payments whilst on leave.

### **Recommendation**

291. Based on stakeholder support, the proposals outlined in the Discussion Paper are recommended.

292. WorkCover WA does not support enabling parties to agree to cease entitlements while a worker is incapacitated. This could lead to workers being encouraged to take leave in replacement of compensation payments, which is contrary to the purpose of the provisions.
293. These provisions will be subject to any industrial agreement or employment contract regarding accessing leave, such as the requirement for agreement between the employer and worker prior to accessing leave entitlements.

#### **Entitlement to leave while incapacitated**

- R:33** It is recommended the new statute provide:
- i) a worker may access accrued leave entitlements while incapacitated if agreed with the employer;
  - ii) a worker may receive leave entitlements and weekly compensation concurrently;
  - iii) leave cannot be paid in replacement of weekly compensation.

### **First aid and emergency expenses**

294. In cases where a worker requires emergency medical evacuation by the Royal Flying Doctor Service or similar service, costs incurred can be significant. These fees currently form part of the amount allowed for reasonable medical and allied health expenses (up to 30% of the prescribed amount). In some cases emergency evacuation fees can absorb a significant proportion of the entitlement available for reasonable medical expenses.
295. The Discussion Paper proposed the cost of “ambulance or other service to carry the worker to hospital or other place for medical treatment” fall under the category of ‘other expenses’, separate from the 30% maximum entitlement for medical entitlements.

### **Stakeholder submissions**

296. Stakeholders on the whole support this submission with the limit of reasonableness applied. Some stakeholders take the view the expenses involved should be capped or limited. It is also submitted the terms ‘reasonable’ and ‘emergency’ be defined.

### **Recommendation**

297. The concept of capping an emergency expense has not been adopted. WorkCover WA is not satisfied that this is an area where excessive regulation is required. As such, it is recommended that the new entitlement is limited to reasonable expenses incurred for emergency treatment.



298. WorkCover WA considers the terms ‘emergency’ and ‘reasonable’ to be widely understood and has not recommended they be defined in the new statute.

#### **First aid and emergency expenses**

**R:34** It is recommended the new statute introduce an entitlement to reasonable expenses associated with ambulance or other service used to transport a worker to hospital or other place for emergency medical treatment. The entitlement will not form part of the maximum entitlement for medical expenses.

### **Common law impairment assessment expenses**

299. The entitlement of workers for reimbursement of expenses associated with common law impairment assessments by an AMS is established in clause 17(1aa) of Schedule 1.
300. Some workers may require a referral to more than one medical practitioner or specialist in order for an AMS to complete their impairment assessment.
301. The Discussion Paper proposed the new statute clarify the entitlement for expenses associated with a worker’s first common law impairment assessment includes the cost of referrals to medical practitioners, specialists or allied health providers (i.e. for diagnostic imagery) in order to complete the assessment.
302. All submissions received on this proposal support its adoption in the new statute.
303. The new statute will also clarify an anomaly in the Act regarding the payment of travel expenses associated with common law impairment assessments.

#### **Common law impairment assessment expenses**

**R:35** It is recommended the entitlement for expenses associated with a worker’s first common law impairment assessment include the cost of referrals to medical practitioners, specialists or allied health providers in order to complete the assessment.



## Noise induced hearing loss

304. Noise induced hearing loss is defined in s5 of the Act as:
- a noise induced loss or diminution of a worker's hearing that is permanent and is due to the nature of any employment in which the worker was employed, other than a personal injury by accident*
305. The Act establishes a pathway for compensation for workers who have sustained work related gradual onset NIHL. Workers are entitled to compensation where NIHL of 10% or more is sustained and where the loss has occurred after 1 March 1991.
306. The audiometric testing and NIHL regime has operated essentially unchanged since 1991. A number of reviews of aspects of the NIHL arrangements have been undertaken and all have concluded the NIHL provisions:
- impose a significant administrative burden on WorkCover WA for a comparatively small number of claims;
  - require amendment to incorporate current practice and regulatory provisions in the Act.
307. The Act creates a requirement for employers in a prescribed workplace to adhere to and pay for a hearing testing regime for workers. A workplace will be a prescribed one if it is one where a worker receives or is likely to receive noise at or above the level prescribed in regulations. The regime is founded on a compulsory baseline air conduction test and subsequent tests at the worker's request.
308. The baseline and subsequent tests are carried out by approved audiometric officers.<sup>2</sup>
309. Currently when a subsequent air conduction test shows a hearing loss of 10% or more above the baseline test a potential claim arises and WorkCover WA notifies the worker. Further assessments are then carried out by an audiologist to confirm the percentage of noise related hearing loss and an Otorhinolaryngologist (ENT) who provides an opinion on whether and to what extent the hearing loss is work related.

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<sup>2</sup> Approved audiometric officers are not required to have a medical or other qualification. They are approved by WorkCover WA. They are required to successfully complete a one week training course and are required to complete a minimum of 12 tests a year. Medical Practitioners and Audiologists may also be approved to complete audiometric testing.

310. Analysis of WorkCover WA NIHL data indicates an average of 825 potential NIHL claims are identified each year. Of that number approximately 200 proceed with further audiological testing and ENT assessment resulting in approximately 100 workers receiving compensation with an annual cost to the scheme of approximately \$1.66m. WorkCover WA records indicate approximately 60,000 audiometric tests are conducted by approved audiometric officers each year. There are currently 520 approved audiometric officers.

### Level of technical oversight

311. WorkCover WA has an extensive level of technical oversight over audiometric testing process and procedures. This includes approval of audiometric officers and registration processes for audiologists. WorkCover WA also approves equipment and registers annual calibrations of audiometers and testing booths. Approval processes are in place for people who assess testing booths and environments and for calibration laboratories.
312. The Discussion Paper proposed:
- discontinuance of WorkCover WA's responsibility for approval of audiometers or testing booths;
  - persons conducting baseline and subsequent tests, and full audiometric tests, to be required to conduct tests and use calibrated equipment in compliance with prescribed standards.

### Stakeholder submissions

313. Submissions were received from ENTs, audiologists, calibration professionals and Audiology Australia. Submissions note that NIHL is a significant health and economic problem in Australia.
314. Submissions express a high level of concern about WorkCover WA's proposal to step away from the approval process in relation to audiometric testing equipment. The system is generally viewed as working well and standards of equipment calibration in the Western Australian jurisdiction are perceived as high. The concerns outline that in the absence of WorkCover WA requirements for approved procedures and equipment:
- standards could slip leading to inaccurate results;
  - there could be an increase in disputed test results;
  - an increase in disputes could drive the cost of assessments higher;
  - an increase in disputes may lead to a reluctance on the part of ENTs to assist with NIHL claims;

- lack of regulation could lead to falsely elevated results and subsequently extra costs and misinformation to workers.
315. Stakeholders also submit:
- the consequences of occupational NIHL are high;
  - the significant ongoing allocation of resources to the NIHL procedures should be balanced against the loss of approval structure that has already been built at significant cost;
  - uncertainty over the monitoring of compliance with standards;
  - the approval process is vital for the success of the NIHL provisions and should not be removed for expediency;
  - removing the approval process leaves a gap with no alternative being put into place.
316. Audiology Australia notes that without central oversight there is potential for poorly performed baseline tests, “for which there will be little recourse decades into the future when compensation claims are made”.
317. It is also submitted if WorkCover WA proceeds to prescribe standards the reference should be to current Australian Standards.

### Recommendation

318. WorkCover WA acknowledges the concerns expressed in relation to maintenance of equipment standards. WorkCover WA has weighed these concerns against the current level of regulation and the number of claims which proceed in this area. WorkCover WA is of the view a lighter touch should be applied to regulation in this area. It is acknowledged this approach carries with it the risks outlined in submissions.
319. Currently an approved audiometric officer is required to ensure tests use equipment with current calibration certification in place. WorkCover WA registers all equipment used and an attempt to record a test result on equipment that does not have an updated calibration will result in the test record being rejected. This process relies on current approval and registration procedures.
320. It is recommended the new statute provide capacity for WorkCover WA to create a 3 yearly approval procedure for audiometric officers which will incorporate conditions requiring use of correctly calibrated equipment. Such a system would place an onus on equipment owners and audiometric officers to ensure calibration is up to date.
321. It is further recommended the new statute empower WorkCover WA to audit the compliance of audiometric officers with equipment and calibration standards.
322. A three year registration process for approved audiometric officers provides consistency with proposed regulatory regimes for AMS and vocational rehabilitation providers.

### Oversight of audiometric officers

- R:36** It is recommended the new statute provide for a 3 yearly approval procedure for audiometric officers incorporating conditions requiring use of correctly calibrated equipment.
- R:37** It is recommended the new statute empower WorkCover WA to audit the compliance of audiometric officers with equipment and calibration standards.

## Prescribed workplace

323. The concept of a prescribed workplace is a key element of the NIHL scheme. It determines employers' responsibility to facilitate and pay for baseline and other hearing assessments for workers. The scheme is predicated on a prescribed workplace being one where an employee is at risk of NIHL.
324. The current regulatory definition of 'prescribed workplace' is considered by WorkCover WA to be deficient in that it relies upon knowledge of noise levels within a workplace. Where these levels have not been measured or determined, employers' obligations and WorkCover WA's enforcement powers are unclear.
325. The Discussion Paper proposed the threshold for a testing requirement in the workplace move from being a technical one governed by a prescribed noise level to a practical one, where an employer would be required to test if their workplace is one in which hearing protection is worn or should be worn.
326. It was further proposed WorkCover WA have the capacity to deem a workplace as one in which testing should occur.

## Stakeholder submissions

327. A number of stakeholders express concern about the proposal to change the definition of a prescribed workplace, in particular, the lack of an express noise exposure level is seen as creating uncertainty.
328. The further proposal for WorkCover WA to have the power to deem a workplace as prescribed is supported by ICWA, ICA, Department of Mines and Petroleum (Western Australia) and WorkSafe Division, Department of Commerce. CCI oppose the proposal on the basis:
- it is unclear how the provision would work in practice particularly as the regulator is WorkSafe WA not WorkCover WA; and
  - the criteria for notification and inclusion are unclear.

## Recommendation

329. In view of the level of stakeholder concern about lack of a prescribed noise level, the recommendation to amend the definition of a prescribed workplace will not proceed.
330. It is recommended the new statute empower WorkCover WA to deem a workplace to be one where testing must occur. WorkCover WA currently lacks a clear power to require testing without incurring significant cost and considers a power of this nature is fundamental to the efficacy of the testing regime.

### Capacity to require audiometric testing

**R:38** It is recommended WorkCover WA have the power to deem a workplace to be one where audiometric testing must occur.

## NIHL claim process

331. Prior to a worker lodging an election for a lump sum payment for NIHL WorkCover WA plays a central role in processing the claim. This includes identifying and notifying workers with potential claims. Where a worker wishes to proceed with a claim full audiological tests and ENT appointments are organised by WorkCover WA. WorkCover WA consults the employer in regard to their choice of audiologist and ENT and proceeds to organise the appointments as required. In addition employment histories are collected, relevant insurers identified and apportionment of liability calculations are undertaken.
332. The Discussion Paper proposed aligning NIHL claims more closely with the general claim process proposed in the new statute by requiring insurers to undertake an increased role in the management of these claims.
333. The Discussion Paper also proposed where a subsequent audiometric test indicates loss of hearing which is 10% or higher, that test will be *prima facie* evidence of NIHL and the worker can lodge a claim with the employer on that basis.
334. Inherent in this proposal is the capacity of the insurer on receipt of the claim, to conduct further testing to establish the quantum of hearing loss and confirmation that it is work related. The audiologist and ENT used by the insurer will not require WorkCover WA approval.

### Stakeholder submissions

335. Response to this proposal is mixed. The proposal is supported by the Department of Mines and Petroleum (Western Australia), ICA and ICWA and in principle by QBE. CCI support the proposal on the basis that the *prima facie* evidence is obtained from an ENT.
336. The proposal is not supported by medical and hearing professionals. Submissions note:
- a significant number of audiograms indicate a 10% threshold where the hearing loss was not due to noise exposure;
  - the proposal could result in insurers questioning more claims;
  - workers could be compensated for claims that included other types of hearing loss;
  - a full NIHL assessment by an ENT is required;
  - the proposal would lead to an increase in the number of workers being compensated for hearing loss.
337. Audiology Australia submits that removal of audiologists from the compensation pathway risks a significant increase in inaccurate assessments of noise injury with increasing costs associated with resolving those claims. They submit approved audiometric officers do not possess the skills and knowledge to:
- separate likely noise and non-noise elements within a hearing loss
  - identify workers who are seeking to manipulate the tests;
  - identify other hearing conditions with sufficient accuracy.

### Recommendation

338. It is acknowledged air conduction testing conducted by approved audiometric officers is not a definitive test but rather one which is used to provide an indication that hearing loss related to noise has occurred. The test does not establish the work relatedness of the hearing loss. In the context of the Act the test is undertaken in an environment where work noise levels are considered to be high and so the potential for damage to the worker's hearing exists.

339. In deeming an audiometric test indicating a 10% loss of hearing as *prima facie* evidence of NIHL, WorkCover WA is shifting the responsibility for further testing and assessment of the claim to the insurer. If the insurer wishes to displace the *prima facie* evidence they must do so within the prescribed timeframe on the basis that the threshold 10% loss of hearing is not established or that the hearing loss is not work related. In the absence of testing within the prescribed time the claim for NIHL will become payable at the percentage identified by the subsequent audiometric test.
340. WorkCover WA recommends where a subsequent audiometric test indicates a 10% loss of hearing that test is deemed as *prima facie* evidence of NIHL and the basis for a claim is established. An insurer will be able to displace the *prima facie* evidence with:
- a full assessment by an audiologist or ENT if the issue relates to the percentage loss of hearing; or
  - an assessment by an ENT if the issue relates solely to work relatedness.
341. The insurer's evidence must be obtained within the prescribed timeframe at the insurer's cost.
342. Any further assessment a worker wishes to undertake to challenge an employer's test results will be at the worker's expense.
343. Where a matter is disputed an application for conciliation can be made.
344. In addition, currently where a worker or employer disputes a test result or assessment they are entitled to seek a retest which is funded by WorkCover WA. The Discussion Paper proposed the new statute provide where a party seeks a retest that party is responsible for the cost of the test. The proposal was supported by stakeholders.

#### **Processing noise induced hearing loss claims**

**R:39** It is recommended where an audiometric test indicates a 10% loss of hearing that test is deemed as *prima facie* evidence of noise induced hearing loss and the basis for a claim for compensation.

**R:40** It is recommended an employer/insurer may displace the *prima facie* evidence, within the prescribed timeframe with:

- i) a full assessment by an audiologist or ENT if the issue relates to the percentage loss of hearing; or
- ii) an assessment by an ENT if the issue relates solely to work relatedness.

**R:41** It is recommended where a party disputes a test in relation to a noise induced hearing loss claim the disputing party is responsible for the cost of any further testing conducted at their instigation.



## Related claim proposals

345. The Discussion Paper also proposed:

- the claim process for NIHL be reviewed and prescribed in regulations;
- standard decision making timeframes will apply to the claim process for NIHL.

## Stakeholder submissions

346. Generally the proposal to prescribe the claim process for NIHL in regulations is supported in principle. ICA's support is subject to appropriate consultation to allow feedback on operational aspects.

347. Submissions on the application of standard decision making timelines to noise claims raise the following concerns:

- current claim timelines are not appropriate for NIHL claims;
- application of current claim timelines to NIHL claims could result in further delays;
- latent nature of NIHL claims adds complexity to decision making;
- there is no prejudice to the worker in extending the timeline for decision making on NIHL claims.

## Recommendation

348. It is not WorkCover WA's intention to impose current 14 or 17 day decision making periods on NIHL claims. Timeframes for decision making for NIHL claims will be considered as part of the regulatory process.

349. It is recommended the new statute provide WorkCover WA with the capacity to make regulations in relation to decision making timeframes for NIHL.

### Noise induced hearing loss claim management

**R:42** It is recommended the claims process for noise induced hearing loss be prescribed in regulations.

## No baseline test

350. The Act provides for the situation where a worker has an audiometric test which indicates loss of hearing has been incurred but the worker has not had a baseline test. In these circumstances, in the absence of agreement with an employer, the question of the extent to which the hearing loss is compensable may be dealt with as a dispute.



351. It was proposed the new statute provide, in the absence of agreement with an employer, the worker must obtain a full NIHL assessment at their cost in order to lodge a claim. However, if the current employer was required to, but did not, conduct the baseline test, they will be required to pay for the assessment. If the claim is disputed, it will be determined by the Conciliation and Arbitration Services.

### Stakeholder submissions

352. This process is generally supported. One stakeholder submits a worker should not be required to pay the cost of the assessment.

### Recommendation

353. It is proposed the new statute provide, where a worker has an audiometric test which indicates 10% or more loss of hearing, in the absence of agreement with an employer, the worker must obtain at their cost:

- a full audiological assessment;
- an assessment of work relatedness from an ENT.

354. Where the further assessments indicate 10% or more NIHL the assessments will be *prima facie* evidence of NIHL and provide the basis for a claim.

355. If it is found the current employer should have conducted the initial baseline test, they will be required to pay for the assessment.

#### No baseline audiometric test

**R:43** It is recommended where a worker has a single audiometric test which indicates 10% or more loss of hearing, in the absence of agreement with an employer, the worker must obtain and pay for a full audiological assessment and assessment of work relatedness from an ENT.

**R:44** It is recommended if a noise induced hearing loss claim is disputed, it may be determined by the Conciliation and Arbitration Services.

### Assessment of work relatedness by audiologists

356. The Discussion Paper proposed where full audiometric testing and determination of work relatedness of hearing loss is required, the testing and determination can be conducted by either an audiologist or an ENT.

357. This proposal is not supported by stakeholders and is not recommended.

## Liability for NIHL claims

358. The Act does not specifically provide for apportionment of liability where workers have been exposed to occupational noise in more than one workplace. An informal agreement has operated for many years between insurers for the costs of each NIHL claim to be shared based on the proportion of time a worker was engaged by an individual employer.
359. Potential and actual difficulties arise for workers who have experienced a gradual onset condition to accurately recall employers over a lengthy employment history. A worker may currently be required to recall their employment history from 1991 – a task which can prove difficult where there have been numerous employers.
360. The Discussion Paper proposed liability be apportioned between employers over the 5 years prior to the date the claim is accepted. Liability will be proportionate to the period of employment.

## Submissions

361. The majority of submissions are in favour of the proposal with varying views on the period of apportioning liability, ranging between 5-10 years. CCI supports the proposal if timeframes are reviewed regularly. The ICA submits transitional arrangements are required to ensure appropriate premiums are collected and potential existing claims are not affected by the proposal.
362. Audiology Australia submits “noise injury is highly predictable, particularly for individuals in certain age groups with certain work histories” and expresses a concern that limiting the apportionment period to 5 years could result in discrimination against older applicants.
363. WorkSafe WA seeks clarification of whether subsequent audiograms could be taken into account in the apportionment process.

## Recommendation

364. WorkCover WA acknowledges ICA’s comments in relation to premiums but notes that the number and quantum of claims in this area are relatively low and as such does not consider complex transitional arrangements are warranted.
365. Introduction of a limited timeframe of 10 years is recommended. Apportionment will be proportionate to the period of employment and subject to results of hearing testing conducted during the employment period. The recommendation below takes into account the range of timeframes submitted and the gradual onset of NIHL.

366. WorkCover WA will provide insurers with information to assist insurers to ascertain employers /insurers with a liability in respect of the apportionment period.

#### **Liability for noise induced hearing loss claims**

**R:45** It is recommended the new statute provide the worker is to lodge a noise induced hearing loss claim with the employer who last employed the worker in employment to the nature of which noise induced hearing loss is due.

**R:46** It is recommended the new statute provide liability for noise induced hearing loss claims be apportioned between employers in workplaces to the nature of which noise induced hearing loss is due. Liability will be:

- i) proportionate to period of employment; and
- ii) subject to results of relevant hearing tests conducted by an employer within a 10 year apportionment period.

**R:47** It is recommended the new statute empower WorkCover WA to provide information to insurers on the status of insurance coverage of employers.

### **Additional issue raised by stakeholders**

#### **Increased compensation and a reduction in the 10% threshold for claims**

367. It was submitted consideration should be given to increasing compensation levels for NIHL and reducing the threshold at which a claim is triggered as an incentive to employers to reduce the incidence of NIHL in their workplaces. This proposal is noted however amendments of this kind are outside the scope of this review.

## Industrial diseases

368. No changes are proposed to the general operation of the industrial disease provisions in the Act other than the consolidation of provisions within a single division of the Act and amendments to streamline legislative processes for asbestos related diseases.

### Consolidation of asbestos diseases provisions

369. If a worker is rendered less able to earn full wages by reason of suffering pneumoconiosis, mesothelioma, lung cancer or diffuse pleural fibrosis and the relevant criteria in s33 are met, an 'injury' being that disease occurs for the purposes of the Act.
370. Historically workers suffering asbestos diseases have claimed compensation in accordance with the provisions of Schedule 5. Most clauses within Schedule 5 make special provision for weekly payments and lump sum payments for workers suffering specific asbestos diseases over the age of 65.
371. Prior to the 2011 legislative changes weekly compensation payments ceased at the age of 65, or if over 64, one year after the injury occurred. The amendments made to s56 which came in effect on 1 October 2011 removed the age limits.
372. Due to the removal of age limits the Discussion Paper proposed Schedule 5 be repealed.
373. It is proposed specific entitlements for asbestos diseases be clarified and located in the Compensation Part of the new statute.
374. Diffuse pleural fibrosis is one of the four specified industrial diseases and is included in s33 (establishment as an injury) but excluded in Schedule 5. To remedy a drafting oversight diffuse pleural fibrosis will be included in the Compensation Part of the new statute.

### Stakeholder submissions

375. There is no stakeholder opposition to the proposed repeal of Schedule 5 and consolidation of asbestos provisions in the Compensation Part of the new statute.

### Recommendation

#### Repeal of Schedule 5

**R:48** It is recommended Schedule 5 of the current Act be repealed and provisions impacting on compensation for asbestos related diseases be located in the Compensation Part of the new statute.

## Lump sum payment for asbestos diseases

376. Currently, Schedule 5 enables a worker over the age of 65 suffering pneumoconiosis, mesothelioma or lung cancer to elect to receive a special redemption lump sum (currently \$63,434) or a weekly supplementary amount of \$268.98 (dependent spouse) or \$151.01 (no dependent spouse), irrespective of age.
377. Due to the long latency period most workers suffering asbestos related conditions are over the age of 65 and not working. While the age limits have been removed there is still a need to preserve the special lump sum for those workers who may not be eligible for weekly payments.
378. Within Schedule 5 there are various clauses providing specifically for persons aged 65 or more with asbestos conditions occurring immediately before and after the 1984 and 1990 amendments came into operation. These are redundant and can be repealed.
379. The Discussion Paper proposed the Act clarify access to the lump sum entitlement for workers suffering industrial diseases described in s33, including:
- the express inclusion of diffuse pleural fibrosis;
  - the discontinuation of the supplementary weekly payment;
  - the indexation of the asbestos diseases lump sum at 30% of the prescribed amount.
380. A worker who suffers an asbestos disease which is, or was, due to the nature of any employment in which the worker was employed before the contraction of the disease will be entitled to the asbestos diseases lump sum. This payment will not be subject to entitlement to weekly payments (incapacity) being established and is not compensation for loss of income or economic loss.
381. There is no intention to limit a person's right to claim weekly payments and to settle the claim in the normal manner if an entitlement can be established (e.g. the person is employed, incapacitated for work and claiming weekly payments). As is currently the case, to establish a claim for weekly payments a worker will need to prove incapacity for work resulting from the injury. The only limit on weekly payments in these circumstances is the prescribed amount and the medical evidence on the nature and extent of the worker's incapacity for work.

## Stakeholder submissions

382. Stakeholders support the various proposals relating to the asbestos diseases lump sum outlined in the Discussion Paper with strong support for the inclusion of diffuse pleural fibrosis.

383. The Asbestos Diseases Society of Australia Inc (ADS) submission outlines concerns with the effect of a worker receiving a lump sum payment on the age or disability pensions and the availability of a health care card. The Commonwealth Government interpret the payment as a payment for lost income or earning capacity possibly due to an anomaly in the Act which implies the lump sum is available where entitlement to weekly payments is established. This is an incorrect classification of the entitlement which will be clarified in the new statute.

### Recommendation

#### Lump sum compensation for asbestos diseases

- R:49** It is recommended the new statute define an asbestos diseases lump sum entitlement.
- R:50** It is recommended the new statute clarify the asbestos diseases lump sum applies to workers suffering pneumoconiosis, mesothelioma, lung cancer and diffuse pleural fibrosis.
- R:51** It is recommended the asbestos diseases lump sum amount be 30% of the prescribed amount.
- R:52** It is recommended the supplementary weekly payment for asbestos disease be discontinued.
- R:53** It is recommended the new statute clarify receipt of the asbestos diseases lump sum finalises statutory payments but does not constrain the right to pursue and receive common law damages.

### Successive lung diseases

384. Schedule 5 clause 1A has the effect of ensuring if a worker suffers at the same time or successively more than one of the asbestos conditions pneumoconiosis, mesothelioma or lung cancer, they are to be regarded as the same injury. This ensures the progression of the disease does not give rise to separate entitlements under the Act.
385. As a result of diffuse pleural fibrosis being included within s33 as a compensable disease in 2011 the Discussion Paper proposed the successive lung disease provision also apply to this disease.

### Stakeholder submissions

386. Stakeholders support this proposal. The ADS and Slater & Gordon seek an assurance the receipt of the lump sum does not impact a worker's right to pursue and receive common law damages in relation to the same or successive diseases.

## Recommendation

387. The successive lung disease provision in the Act relates only to compensation claimed under Schedule 5 and does not impact on rights to pursue and receive common law damages. However, to avoid doubt this will be clarified in the new statute.
388. Whether a common law claim would succeed for a successive asbestos disease may be constrained by common law principles. Such limitations are outside the scope of this review and the Act.

### Successive lung diseases

**R:54** It is recommended the new statute clarify the successive lung disease limitation applies to statutory compensation only and includes diffuse pleural fibrosis.

## Claim and assessment process for asbestos diseases

389. The Discussion Paper proposed to consolidate the panel determinations required for statutory and common law purposes as a single process (consolidating the questions under s38 and s93R) and to align the common law procedural requirements relating to asbestos diseases with current practice.
390. A recent operational review of the claims and panel assessment process for asbestos related diseases and further consultation with stakeholders indicate a number of additional legislative changes are required.

## Definition of asbestos disease

391. Under s33 if a worker is rendered less able to earn full wages by reason of suffering pneumoconiosis, mesothelioma, lung cancer or diffuse pleural fibrosis and the relevant criteria in s33 are met, an 'injury' being that disease occurs for the purposes of the Act.
392. The current provision is to be redrafted to remove the reference to 'being rendered less able to earn full wages', and to set out the section in plain English.
393. It is recommended an injury occurs for the purposes of the Act if a worker suffers an asbestos disease and the disease is, or was, due to the nature of any employment in which the worker was employed before the contraction of the disease.



394. An asbestos related disease is to be defined as pneumoconiosis, mesothelioma (on or after 8 May 1970), lung cancer (on or after 3 May 1982) or diffuse pleural fibrosis (on or after 19 September 2009). In accordance with Schedule 3, all diseases apply to any process entailing heavy exposure to asbestos dust, other than pneumoconiosis which applies to any process entailing exposure to mineral dust harmful to the lungs.

### **Claim for asbestos related diseases**

395. A claim in relation to an asbestos related disease must be made on the employer (and copied to WorkCover WA) and contain the details and particulars prescribed in regulations. Regulations will require the claim to be supported by certain historical records, medical reports and test results which are currently required by the panel to make its determination.
396. A special claim form will be prescribed known as the ‘asbestos disease claim form’ which will capture details and historical information more relevant to these diseases – similar to that used by the ADS.
397. In accordance with current practice an employer will be required to send prescribed particulars relating to the claim to WorkCover WA within 14 days of the date the claim is made on the employer.

### **Asbestos Diseases Medical Panel**

398. Where an asbestos related disease claim is made, an Asbestos Diseases Medical Panel (ADMP) will be convened and make a determination as soon as practicable after:
- a claim has been made on the employer and WorkCover WA and the information required by regulations has been submitted;
  - any examination and tests required by the panel are completed;
  - reasonable opportunity has been made for certificates of medical practitioners to be submitted for the Panel’s consideration.
399. The ADMP may require the worker to be assessed or examined in accordance with current processes.
400. The existing requirement for the panel to comprise 2 or 3 physicians who specialise in diseases of the chest or occupational disease will continue. As recommended in this report, the WorkCover WA CEO will approve medical practitioners for this purpose.
401. As one of the determinations required in support of a claim for common law damages relates to the assessed level of WPI at least one of the members of the ADMP is to be approved as an AMS.



## Determination by the Asbestos Diseases Medical Panel

402. The current questions determined by the panel under s38 require streamlining. The Discussion Paper proposed the consolidation of determinations required for statutory and common law purposes as a single process (consolidating the questions under s38 and s93R).
403. Most panel assessments are sought for common law purposes yet historically the panel has assessed the level of impairment for common law against the question:
- to what extent if any does, or did the asbestos disease adversely affect the worker's ability to undertake physical effort?*
- The relevant determination required is 'what is the assessed level of permanent whole of person impairment?' Further s38 refers to anachronistic concepts such as 'rendered less able to earn full wages' which do not relate to either the claim for the asbestos diseases lump sum or the impairment assessment for common law purposes.
404. It is recommended the questions required to be determined by the ADMP be simplified and aligned directly to support a claim for compensation and common law damages. The recommended questions are:
- is, or was, the worker suffering from pneumoconiosis, mesothelioma, lung cancer or diffuse pleural fibrosis (asbestos related disease)?
  - what is the assessed level of permanent Whole Person Impairment (WPI) attributable to the asbestos related disease?
405. A positive answer to the first question above facilitates a claim for the asbestos diseases lump sum provided it is accepted the disease is, or was, due to the nature of the employment in which the worker was employed.
406. The determination given for the second question above relates to the impairment threshold required to pursue common law damages. If 15% or greater the worker may elect to pursue common law damages in the normal manner by also filing the panel determination with the election.
407. The determination will set out the reasons for the findings certified and be in the form and contain the details approved by the WorkCover WA CEO.
408. The determination of the panel or a majority of its members will be final and conclusive and binding on the worker, employer and on any tribunal (note the qualification below regarding common law). The parties will not be bound by a previous decision of the panel and a subsequent determination can be made if the worker has not been paid compensation and provides medical evidence demonstrating there has been a deterioration in one or more asbestos related disease.

### Special provisions about common law assessments for ARDs

409. It is recommended the existing special provisions relating to common law assessments for asbestos diseases continue including:
- no termination day;
  - evaluation of the worker's degree of WPI may be settled by agreement;
  - condition is not required to have stabilised for an assessment of the WPI;
  - assessment to be undertaken by ADMP panel not AMS;
  - panel not bound by a previous assessment if election not recorded.
410. To address an anomaly in s34 where the panel makes an assessment of pneumoconiosis in association with chronic bronchitis the worker is deemed to have pneumoconiosis for both compensation and common law purposes. This means the level of impairment is to combine the diseases and assess them as one.
411. Slater & Gordon submit current practice is such that a worker rarely makes an election under s93K of the Act as:
- given the latent nature of asbestos diseases, the worker is often no longer working at the time of diagnosis (and hence not entitled to weekly payments); and
  - pursuant to s 93R(6) there is no termination day for election to retain the right to seek damages.
412. Slater & Gordon propose that where the worker is suffering from an asbestos disease the requirement to make an election under s93K be abolished to reflect current practice and further expedite the settlement of damages. The ADS concurs with this view.
413. While the termination day does not apply it is important to retain the election requirement for asbestos diseases. The election signals the intention to pursue common law and is a key procedural step in commencing proceedings for all injuries. An election also impacts on the ongoing right to compensation even if most workers with asbestos diseases would not be receiving weekly payments.
414. An election is a simple process which requires the filing of a form and attachment of an ADMP panel assessment or agreement indicating the level of WPI is greater than 15%.

415. Slater & Gordon also submits workers diagnosed with mesothelioma should be deemed to have at least 25% WPI. Slater & Gordon indicates this is a malignant asbestos disease that is uniformly fatal and experience indicates employers do not dispute the level is above 25%. WorkCover WA supports a deeming provision that the WPI attributable to mesothelioma is above 25% which is consistent with the deeming provision for the contraction of AIDS.

### **Compensation for partial or total incapacity**

416. It is highly unlikely persons suffering asbestos related diseases are eligible for weekly payments under the Act. Nearly all claimants are elderly and long retired from the workforce.
417. A worker who is working and seeking weekly payments will need to prove partial or total incapacity for work in the normal manner by submitting with their claim form a medical certificate indicating the level of incapacity together with the panel determination. The ADMP is not required to assess partial or total incapacity for work.
418. Where weekly payments are payable the standard legislative requirements and obligations will apply to the worker and employer (e.g. medical review, injury management, prescribed amount for weekly payments, settlement under the normal pathway).

**Claim and assessment process for asbestos diseases**

- R:55** It is recommended the new statute consolidate and simplify the claim procedure and determinations required for asbestos diseases for statutory and common law purposes.
- R:56** It is recommended the questions required to be determined by the (renamed) Asbestos Diseases Medical Panel are simplified as:
- i) is, or was, the worker suffering from pneumoconiosis, mesothelioma, lung cancer or diffuse pleural fibrosis?
  - ii) what is the assessed level of permanent whole person impairment attributable to the asbestos related disease?
- R:57** It is recommended the new statute provide for regulations to prescribe a special claim form for asbestos diseases and set out the requirements before a determination can be made.
- R:58** It is recommended the existing special provisions relating to common law assessments for asbestos diseases continue, including:
- i) no termination day;
  - ii) evaluation of the worker's degree of WPI may be settled by agreement;
  - iii) condition is not required to have stabilised for an assessment of the WPI;
  - iv) assessment to be undertaken by an ADMP panel not an AMS;
  - v) an ADMP panel is not bound by a previous assessment if an election is not recorded.
- R:59** It is recommended a worker diagnosed by an ADMP panel with mesothelioma is deemed to have a level of WPI of at least 25% for the purpose of electing to pursue common law damages.

### **Industrial diseases - repealed provisions**

419. There is no stakeholder opposition to the proposed repeal of the following obsolete or superseded provisions outlined in the Discussion Paper relating to industrial diseases or Schedule 5.

#### **Section 67 settlement pathway for mesothelioma**

420. Section 67(4) enables a worker with mesothelioma to redeem a claim by agreement or, in default of agreement, by order of an arbitrator. This applies where permanent incapacity has resulted from mesothelioma and any weekly payment has been made or the worker is entitled to any weekly payment. Section 68 provides for the calculation of the lump sum applicable to redemptions made under s67(4). These provisions can be repealed as the recommended settlement pathway can accommodate settlements for asbestos diseases where weekly payments have been made.

#### **Redundant Schedule 5 provisions**

421. Schedule 5 clause 2 provides for supplementary payments up to the age of 70 where a worker demonstrates they would have worked after the age of 65 had they not been injured. As the age limits have been removed this clause can be repealed. Schedule 5 clause 9 relates to a death occurring before 8 March 1991 and can be repealed.

#### **Disentitlement of compensation to certain mine workers**

422. Section 47 provides for the disentitlement of the payment of compensation to mine workers in particular circumstances.
423. Section 47, as originally introduced, related to procedures under regulation 6 of the Regulations made under the then *Mines Regulations Act 1906* for medical practitioners to issue provisional certificates. However, over time regulations made under the ruling mines regulation statute ceased to make provision for this arrangement.
424. The current mines regulation statute is the *Mines Safety and Inspection Act 1994* and the current regulations in force under that Act are the *Mines Safety and Inspection Regulations 1995*. There is no provision under these Regulations for a medical practitioner to issue a provisional certificate. Accordingly the arrangement referred to in s47 has fallen into desuetude. As the various limbs of the processes set out in s47 are conjunctive, rather than disjunctive, in nature this disentitling measure is of no effect. Accordingly s 47 is to be repealed.

### Notification of Schedule 3 diseases

425. Section 48 requires employers to notify WorkCover WA of workers suffering diseases described in Schedule 3 of the Act. Notifications about certain Schedule 3 diseases are also required to be forwarded by WorkCover WA to WorkSafe WA (e.g. poisoning agents). A duty is also imposed on medical practitioners to notify WorkSafe WA of patients suffering Schedule 3 diseases where it is believed these are work related.
426. WorkCover WA receives details of injuries, including Schedule 3 diseases, as part of the claims process and returns from approved insurers. Separate notification of Schedule 3 diseases by employers and medical practitioners is not required. Similarly WorkSafe WA receives de-identified data from WorkCover WA on all workplace injuries and can, under s100B, request specific information relating to accidents, injuries and diseases relevant to occupational safety and health. Accordingly, s48 will be repealed.

## Compensation for death

427. Under the Act a deceased worker's dependants have a potential entitlement to:
- a lump sum payment to a maximum of \$283,418 (indexed annually), or apportionment if more than one dependant;
  - a dependent child's allowance of \$54.20 per week (indexed annually) up to the age of 16 or 21 if in full time study;
  - reasonable costs of medical and like expenses incurred between the date of injury and the worker's death;
  - the cost of funeral expenses up to a maximum of \$9,219 (indexed annually).
428. The Discussion Paper highlighted the following issues for attention in the legislative review:
- adequacy of the lump sum payment to dependents of deceased workers, which is one of the lowest of all workers' compensation jurisdictions;
  - the methodology for apportioning the lump sum between dependants which are complex and difficult to apply;
  - the requirement on a child through their legal guardian to elect between the child's allowance and lump sum benefit - in all other workers' compensation jurisdictions, the weekly allowance for children is not affected if the child also has a claim on the lump sum payment;
  - the need to simplify the legislation and facilitate speed of access to dependants;
  - improvements to the trust account arrangements for payments made by WorkCover WA to dependants under the Act.
429. There is no intention to amend the requirement for financial dependency or the kinds of dependants eligible for entitlements. However, the Discussion Paper proposed a new framework for death and funeral entitlements:
- the definition of the terms 'dependant', 'member of the family', 'spouse' and 'de facto partner' be consolidated in the new statute and located within the subdivision dealing with death entitlements;
  - the new statute introduce a new maximum 'lump sum death benefit' for family members totally dependent on the worker's earnings, increased from \$283,418 to 2.5 times the prescribed amount (currently \$516,855);

- no deduction be made from the lump sum death benefit for prior workers' compensation payments to the deceased worker;
  - the new statute set out, in table form, the family members eligible for the lump sum death benefit and their proportionate share – see Table 3 - Dependant share of death benefit;
  - totally dependent children be entitled to a share of the lump sum death benefit in addition to the prescribed children's allowance;
  - the lump sum payment for a partial dependent be an amount proportionate to the loss of financial support suffered;
  - the new statute no longer provide for a minimum amount payable as a death benefit to dependents;
  - the prescribed children's allowance of \$54.20 per week (indexed annually) be available to both totally and partially dependent children;
  - the requirement for a child to elect between the prescribed children's allowance and lump sum payment be discontinued;
  - new statute consolidate all provisions relating to funeral expenses and medical treatment for a worker who dies;
  - the new statute provide for payment of the prescribed children's allowance from WorkCover WA's Trust Account either weekly or any other period as specified in an order, but not as an advance payment or commutation;
  - the new statute provide for the amount of the prescribed children's allowance to be discharged as a liability of the employer/ insurer by payment of a lump sum to WorkCover WA;
  - the entitlement of a dependent to redeem a claim where a worker dies, but the death is not the result of the compensable injury, be discontinued.
430. It has also been brought to WorkCover WA's attention that an avoidance of doubt provision is required to clarify that any compensation payable to a dependant ceases upon payment of damages to the dependant by the employer pursuant to a judgment, consent to judgment or settlement by agreement. This would clarify where damages are paid WorkCover WA's obligations to duly administer any payments from the trust account to dependants under an order of an arbitrator come to an end.



**Table 3 – Dependant share of death benefit**

Dependants	Proportion
Totally dependent spouse or defacto Partner, no children	100%
One totally dependent child, no totally dependent spouse or defacto partner	100%
2 or more totally dependent children	Equally between children
Totally dependent spouse or defacto partner, and one totally dependent child	10% to child, balance to spouse or defacto partner
Totally dependent spouse or defacto partner and not more than 5 totally dependent children	5% to each child, balance to spouse or defacto partner
Totally dependent spouse or defacto partner and more than 5 totally dependent children	25% divided equally between children, balance to spouse or defacto partner.
Dependant(s) totally dependent, and where no totally dependent spouse, defacto partner or children	An amount that is reasonable and proportionate to the financial losses of support suffered, not exceeding 100%.

### Stakeholder Submissions

431. There is strong stakeholder support for a new framework for death and funeral entitlements.
432. Most stakeholders support an increase in entitlement from \$283,418 to 2.5 times the prescribed amount (2013/14 - \$516,855). UnionsWA support a larger increase equal to the highest benchmark for all jurisdictions. Combined Small Business Alliance of Western Australia (Inc) (CoSBA) does not support the increased entitlement indicating that death entitlements are mandatory in superannuation schemes and workers can obtain additional private insurance if the current level of cover is inadequate.
433. All stakeholders support the proposed methodology for apportioning the lump sum between dependants.
434. Three submissions indicate opposition to the proposal that compensation paid to a deceased worker not be deducted from a lump sum paid to a dependant.

435. One stakeholder suggests the dependent children's allowance should also be increased.

### Death entitlement cost impacts

436. WorkCover WA commissioned PwC to undertake an actuarial assessment of the estimated cost impact of implementing the proposed death entitlements.
437. Based on the 2013/14 financial year PwC estimate the increased death entitlements will result in an additional scheme cost of \$3.2 million per annum which equates to a 0.33% increase in the 2013/14 average recommended premium rate for the scheme.

### Recommendation

438. The increased lump sum payment for a workplace fatality addresses a significant gap in the amount paid to totally dependent family members compared to other Australian jurisdictions.
439. Although private insurance arrangements and superannuation funds may provide for a lump sum payment for a person's death there are usually exclusion clauses if the liability is covered under a workers' compensation law (to avoid double insurance). These additional insurance arrangements also vary significantly and would require the worker to secure gap insurance for a work related death beyond the statutory rate. The proposed increase in the death entitlement is considered a fair and reasonable statutory entitlement to mitigate the financial impact of a worker's death on surviving dependants.
440. It is also recommended there be no deduction from the dependent's entitlement for any compensation paid to the worker prior to their death. The dependent's entitlement is a different form of compensation that may have been paid to the worker prior to their death and no deduction should apply.

#### Lump sum death entitlement

**R:60** It is recommended the new statute introduce a new maximum 'lump sum death entitlement' for family members totally dependent on the worker's earnings.

**R:61** It is recommended the lump sum death entitlement be set at 2.5 times the prescribed amount.

**R:62** It is recommended no deduction is to be made from the lump sum death entitlement for prior workers' compensation payments to the deceased worker.

**Lump sum apportionment**

- R:63** It is recommended the new statute set out, in table form, family members eligible for the lump sum death entitlement and their proportionate share.
- R:64** It is recommended totally dependent children be entitled to a share of the lump sum death entitlement in addition to the prescribed children's allowance.
- R:65** It is recommended the lump sum payment for a partial dependent be an amount proportionate to the loss of financial support suffered.
- R:66** It is recommended the new statute no longer provide for a minimum amount payable as a death entitlement to dependents.

**Dependent child allowance**

- R:67** It is recommended the prescribed children's allowance be available to both totally and partially dependent children.

**Dependent child allowance and lump sum**

- R:68** It is recommended the requirement for a child to elect between the prescribed children's allowance and lump sum payment be discontinued.

**Funeral and other expenses**

- R:69** It is recommended the new statute consolidate all provisions relating to funeral expenses and medical treatment for a worker who dies.

**Death benefits – Trust Account**

- R:70** It is recommended the new statute provide for payment of the prescribed children's allowance from WorkCover WA's Trust Account either weekly or any other period as specified in an order, but not as an advance payment or commutation.
- R:71** It is recommended the new statute provide for the amount of the prescribed children's allowance to be discharged as a liability of the employer/ insurer by payment of a lump sum to WorkCover WA.

**Effect of common law damages on compensation trust arrangements**

**R:72** It is recommended any dependant who is receiving payments of compensation from WorkCover WA's trust account is required to notify WorkCover WA of the terms of any subsequent damages award in relation to the worker's death.

**R:73** It is recommended any compensation payable to a dependant from WorkCover WA's trust account ceases upon payment of damages to the dependant against the employer, whether by way of judgment, consent to judgment or settlement by agreement.

**Redemption of death benefit claim in certain circumstances**

**R:74** It is recommended the entitlement of a dependent to redeem a claim where a worker dies, but the death is not the result of the compensable injury, be discontinued.

## Claim management

### Structure of claim management division and provisions

441. A history of successive amendments to the claim management provisions has resulted in the various provisions which facilitate management of a claim being located throughout the Act. There is a need to ensure the provisions relating to claim management can be easily located, understood and applied.
442. The Discussion Paper proposed collocation of provisions and improvements in structure of claim management provisions in the new statute. These proposals are universally supported by stakeholders and will be implemented as part of structural improvements in the new statute.

### Medical examinations

443. Medical reports are a primary decision making tool in workers' compensation claim management, in terms of assisting liability decisions and the ongoing entitlement to compensation, rehabilitation needs, and return to work programs.
444. Section 66 provides for regulations to prescribe the intervals and regularity of examinations that are allowable. This section was introduced in 2004 following concerns around workers being required to attend an unreasonable number of examinations.
445. The Discussion Paper proposed the provision relating to medical examinations be combined under a single provision to provide clarity around the requirement to attend medical examinations. As outlined above, this proposal will be implemented as part of structural improvements in the new statute.
446. As discussed earlier in this chapter, regulations which currently prevent an employer or insurer from requiring a worker to attend a medical examination in specific circumstances will be discontinued. This is to complement the pended claims recommendation and will assist employers and insurers make decisions on claims in a timely manner.

### Variation of weekly payments

447. Arbitrators have express powers to vary the compensation payable to a worker under ss60 and 62. Both provisions allow an arbitrator to suspend, discontinue or reduce payments, while s62 also enables payments to be increased.

448. A significant body of case law has developed around the interpretation of ss60 and 62 and when the respective use of each is appropriate.
449. WorkCover WA records indicate applications are often filed by employers under s60 and 62 concurrently, indicating the relief sought under each provision is often the same.
450. The Discussion Paper proposed ss60 and 62 be replaced with a single simplified provision empowering an arbitrator to determine the circumstances where it is appropriate to vary the compensation payable to a worker.

### Stakeholder submissions

451. Stakeholders support the intent of the proposal to simplify the provisions and provide clarity. However, a number of submissions highlight the importance of careful drafting of the new provision to recognise the long history of case law and ensure there are no unintended consequences.

### Recommendation

452. WorkCover WA agrees careful drafting will be critical to the operation of the new provision and acknowledges the fundamental importance of ss60 and 62 in dispute proceedings.
453. While it is undesirable to upset the body of case law that has developed, WorkCover WA will seek appropriate advice as part of the drafting process.

#### **Varying compensation through the Conciliation and Arbitration Services**

**R:75** It is recommended the new statute introduce a single provision enabling a worker, employer or insurer to apply to the Conciliation and Arbitration Services to vary (discontinue, suspend, reduce or increase) a worker's entitlement to weekly payments.

### Discontinuing or reducing weekly payments

454. Section 61 outlines the circumstances where weekly payments may be discontinued or reduced by an employer without the need to obtain either the worker's consent or an order of an arbitrator. It does not provide a complete list of circumstances where payments may be discontinued or reduced. The provision is also archaic in part, with subsection 61(1) consisting of a single paragraph of 157 words.
455. The Discussion Paper proposed the section be redrafted to provide clarity around the various circumstances where weekly payments may be discontinued or reduced. The overall intent and application of the provision would be retained.

456. The Discussion Paper also proposed to clarify where a worker has returned to work with the employer paying compensation, the employer would not be required to issue a notice to the worker advising of the discontinuance or reduction in compensation.

### Stakeholder submissions

457. Stakeholders support the intention to consolidate and clarify the provisions relating to discontinuing or reducing weekly payments of compensation. However, there was some disagreement regarding whether an employer should be required to notify a worker regarding a discontinuance or reduction in compensation when the worker returns to work.
458. Submissions also highlighted potential ambiguity around whether there has been a full return to work versus restricted duties or a return to work program.

### Recommendation

459. The principles and fundamental elements of the current s61 will be retained in the new statute. However, in accordance with the Discussion Paper the language and structure will be improved.
460. To address stakeholder concerns regarding the ambiguity around the use of the phrase 'returned to work' and when a notice must be sent to the worker, the new statute will define 'returned to work' in a manner consistent with current case law. This will provide a distinction between a 'full' return to work versus restricted duties or a work trial.
461. These changes will be dealt with as improvements in clarity and structure in the new statute.

### Remuneration from another employer

462. A worker has an obligation under s59 to notify their employer or their employer's insurer if they commence remunerated work. This obligation is to ensure an employer is not obliged to pay the full amount of weekly compensation where a worker is in receipt of remuneration from another source.
463. An employer may request a worker provide particulars of remunerated work. If a worker fails to respond to a request for particulars, the worker may be fined \$500. However, if a worker fails to respond to a request to provide particulars, the only option for an employer to resolve the issue is to engage in dispute resolution proceedings.
464. To rectify this, the Discussion Paper proposed where a worker fails to provide particulars when requested, weekly payments may be suspended until the information is provided.



## Stakeholder submissions

465. WorkCover WA received 10 submissions on the proposal (6 support, 4 oppose).
466. Submissions opposing the proposal argue:
- the proposal places too much authority and power in the hands of the employer and will lead to workers' entitlements being unfairly and unjustifiably cut off;
  - the proposal does not provide appropriate safeguards;
  - if removing a fundamental entitlement of a worker, it is only fair that an application be made in the normal manner at WorkCover WA to allow all relevant evidence to be heard.
467. Submissions also highlight the proposal is contrary to the principle set in case law pertaining to s61 applications – that is, to limit the circumstances in which the employer may unilaterally discontinue or reduce payments without the consent of the worker or order of the Conciliation and Arbitration Services.

## Recommendation

468. It is consistent with the nature of the legislation to limit the circumstances in which an employer can unilaterally vary compensation. However, the obligation of an employer to pay compensation should be balanced with the obligation of a worker to inform the employer of any changes in their circumstances. This is particularly important where the worker is obtaining remuneration from another employer, which should result in a reduction in the compensation payable to the worker.
469. The new statute will provide if a worker fails to respond to a request for details of remunerated work within 14 days from actual receipt of the request (to be confirmed by registered mail), the worker's entitlement to weekly payments may be suspended until the worker responds.
470. Safeguards will be built into the provision to protect workers who fail to respond and have their entitlements suspended but have, in fact, not commenced remunerated work. Specifically, the provision which provides no compensation is payable for a period of suspension will not apply in this case. It is unreasonable to deny reimbursement of compensation to an incapacitated worker merely due to the failure to reply to a notice.
471. The provision will also be amended to clarify the provision applies where the worker is being paid from any employer except the employer who is paying compensation. The intent of the provision is to alert the employer paying compensation the worker is in receipt of remuneration from another source, regardless of whether it is 'new' or existed prior to the injury.



### Remuneration from another employer

**R:76** It is recommended where a worker fails to provide details of remunerated work with another employer upon request, weekly payments may be suspended (without an order of an arbitrator) until the details are provided.

## Worker residing outside the State/Commonwealth

472. Section 69 of the Act provides a worker who leaves the state is entitled to receive weekly payments so long as he or she continues to provide evidence of the continuance of their incapacity and their identity in accordance with regulations. The current requirement is for such evidence to be provided at 3 monthly intervals.
473. There are significant practical difficulties in managing claims where a worker is residing overseas. The Discussion Paper proposed where an injured worker resides outside the state, all compensation entitlements be suspended unless there is a current certificate of incapacity.

### Stakeholder submissions

474. WorkCover WA received a varied response from stakeholders in respect of the proposal, with the lack of technical detail around the current provision identified as a primary issue.
475. One submission highlights the proposal appears to link the payment of all entitlements to the existence of an incapacity.
476. The majority of submissions supporting the proposal highlight the need for more prescriptive criteria around the application of the provision.
477. Stakeholders opposing the proposal argue either the current arrangements should remain or an employer should be required to seek an order in the Conciliation and Arbitration Services to suspend payments.

### Recommendation

478. WorkCover WA considers this provision should only apply to workers who leave Australia. National recognition of medical and health providers including workplace rehabilitation providers means it is not reasonable to impose additional requirements on workers merely because they are in another state.
479. The provision in the new statute will only relate to suspending weekly payments of workers who leave Australia for a prescribed period.

480. The primary issue raised by stakeholders relates to a lack of technical detail in respect of the current arrangements. Accordingly, WorkCover WA recommends maintaining the current provision in substance, with the following improvements in detail:

- the time period commences when the worker leaves Australia;
- if a worker fails to provide the prescribed information within the prescribed period, weekly payments are suspended;
- a worker's weekly payments are to recommence if the prescribed information is subsequently provided. There is to be no back payment of entitlements.

#### **Workers leaving Australia**

**R:77** It is recommended the new statute clarify when weekly payments can be suspended when a worker is outside Australia for a prescribed period.

### **Overseas medical practitioners**

481. The Regulations provide where an injured worker resides overseas the worker and a 'medical practitioner' must complete a Form 6 in order for the worker to continue to receive weekly payments. Medical practitioner is defined to include a person not resident in the State or Commonwealth but who is recognised as a medical practitioner by WorkCover WA. WorkCover WA has not, to date, recognised any medical practitioners outside the Commonwealth.

482. This can cause difficulties in obtaining valid medical certificates when a worker resides outside Australia. The Discussion Paper proposed the definition of medical practitioner be amended to include persons outside the Commonwealth who are appropriately qualified and registered as a medical doctor. The definition may need to align with nationally accepted recognition of overseas doctors.

### **Stakeholder submissions**

483. The majority of submissions support the proposal, with additional comments relating to technical issues around translation of certificates and what agency will be relied upon to verify a medical practitioner's qualifications.

484. Two stakeholders oppose the proposal on the basis overseas medical practitioners are not involved in injury management and are more likely to certify the worker as totally unfit for work. Another submits the current definition as adequate and if a worker is overseas for an extended period settlement should be available.

## Recommendation

485. WorkCover WA believes the proposal to recognise overseas medical practitioners is a practical solution to an issue in respect of which the legislation is currently silent. Failure to provide an avenue for workers outside the Commonwealth to seek medical certification could result in genuinely incapacitated workers being denied compensation.
486. It is acknowledged challenges exist around facilitating claim management and injury management obligations while a worker resides overseas. This is being addressed by enabling settlement where a worker leaves the Commonwealth permanently or indefinitely.
487. The new statute will enable a medical certificate to be issued by a person who is “appropriately qualified and registered outside the Commonwealth as a medical doctor.” It will be up to the insurer to refer to the relevant agency in the relevant jurisdiction to determine if the person is qualified and registered as a medical doctor.

### Overseas medical practitioners

**R:78** It is recommended the new statute extend the definition of ‘medical practitioner’ to include persons appropriately qualified and registered outside the Commonwealth as a medical doctor.

## Suspension of weekly payments when in custody

488. The Act currently provides a worker’s entitlement to weekly payments may be suspended whilst in custody or serving a term of imprisonment. For payments to be suspended, an arbitrator must issue a certificate once satisfied of the grounds for the suspension.
489. The current provisions provide compensation is suspended from the date an arbitrator issues a certificate. This means even though a worker is in custody or imprisoned, the employer will continue to be liable for compensation until a certificate is issued.
490. The Discussion Paper suggested whether a worker is in custody or imprisoned is a matter of fact and proposed entitlements may be suspended by an employer without the order of an arbitrator.

## Stakeholder submissions

491. The majority of submissions support an employer or insurer being entitled to suspend weekly payments if a worker is in custody.
492. Stakeholders opposing the proposal express a concern this would place too much authority in the hands of the employer or insurer to cut off payments and appropriate safeguards need to be built into the legislation.

493. Stakeholders also highlight there is a need for the 'fact' to be subject to a level of proof.
494. Two stakeholders submit an injured worker should be required to prove that their ongoing incapacity for work is due to the pre-incarceration injury upon release.

### Recommendation

495. It is recommended an employer or insurer be entitled to suspend a worker's weekly payments if they have obtained from the relevant authority, written confirmation the worker is in custody. The suspension is to cease upon the worker's release from custody.
496. The suspension will apply for the period of the worker's custody with appropriate safeguards built into the provision where there has been a mistake of fact regarding the worker being in custody.
497. Given the period of custody could vary significantly, WorkCover WA does not support a requirement for all workers to prove their incapacity on release from custody. This can be dealt with by utilising the ordinary arrangements for medical reviews.

#### **Suspension of weekly payments when in custody**

**R:79** It is recommended the new statute provide, where a worker is in custody or serving a term of imprisonment, entitlements may be suspended by an employer without the order of an arbitrator.

### Disputes between employers/insurers

498. The Act currently establishes (ss73, 74, 74A and 75) the obligations of employers and insurers where there is a dispute regarding who is liable (rather than the liability itself) and the process for resolving such a dispute. The provisions aim to:
- ensure a worker's entitlements are preserved even when there is a dispute about who is liable for a compensable injury; and
  - enable an arbitrator to determine apportionment between employers or insurers.

499. A complex body of case law has developed around the interpretation of the provisions, which makes it difficult to propose a simple alternative. Disputes between employers and insurers in respect of apportioning liability are, by their nature, complex disputes. It is likely, regardless of the provisions of the Act, novel and complex scenarios will arise, along with circumstances not contemplated by the legislation. If parties are unable to resolve the issues independently, the courts (or WorkCover WA's Conciliation and Arbitration Services) will continue to be required to make determinations in such matters.
500. The Discussion Paper proposed the current provisions be retained in the new statute and redrafted to ensure their intent is unambiguous, while preserving the precedent set by current case law.

### **Stakeholder submissions**

501. Stakeholders support the intention to provide clarity around ss73 and 74, while acknowledging the complex body of case law in relation to the provision and the need to exercise caution in the drafting.
502. An approved insurer submits that currently, despite the best efforts of insurers, resolution of ss73 and 74 disputes are not always timely or expeditious, leaving injured workers without compensation whilst claim decisions are pended awaiting resolution of the dispute.

### **Recommendation**

503. It is recommended the provisions related to disputes between employers or insurers be redrafted to improve clarity where possible, as supported by stakeholders.
504. WorkCover WA is concerned the inadequacies of the current provisions may result in workers not receiving compensation, as the intent of the provisions is to ensure that where a worker is entitled to compensation, the worker receives compensation regardless of a dispute between employers or insurers.
505. WorkCover WA anticipates the recommendation requiring provisional payments to be made to a worker if a claim is pended will assist in ensuring a worker receives compensation while investigations into the claim are undertaken. However, WorkCover WA acknowledges it is unreasonable for an employer or insurer to be liable for provisional payments if some other employer or insurer is subsequently found to be liable for the claim. Accordingly, provisional payments made in accordance with the new statute will be recoverable if it is subsequently determined or agreed that some other employer or insurer is liable for the claim.

### Disputes between employers/insurers

**R:80** It is recommended the new statute clarify the provisions regarding disputes between employers and disputes between insurers, while maintaining the intent of the current provisions.

**R:81** It is recommended an employer or insurer who has made provisional payments of compensation to a worker be entitled to recover those payments from an employer or insurer who is subsequently agreed or determined to be liable for the injury.

## Settlements

506. There are two settlement pathways under the current Act – a statutory settlement pathway under s76 and a common law settlement pathway under s92(f).
507. There has been a general trend toward an increased use of the common law pathway to settle difficult statutory claims and those that do not meet the statutory settlement criteria. There are no restrictions on the types of claims that can be settled under s92(f) and there is minimal scrutiny of the terms or lump sum.
508. Judicial decisions have resulted in a general lack of clarity in relation to particular elements of the statutory settlement provisions. In addition, stakeholders have often expressed concerns around the current requirement that a worker receive 6 months of weekly payments prior to redeeming a claim.
509. The Discussion Paper proposed amendments to clearly separate statutory and common law settlements to ensure the settlement provisions achieve their purpose and WorkCover WA can accurately monitor settlement activity in the scheme.
510. The proposals involved:
  - introducing a statutory settlement regime to:
    - preserve the intent of the current pathway with claims able to be settled 6 months after the claim is accepted or determined; and
    - enable certain claims to settle before the 6 month time limit if a 'special circumstance' is involved;
  - restricting common law settlements to genuine common law matters only.

## Stakeholder submissions

511. The majority of stakeholders:
- support widening the scope of the statutory settlement pathway;
  - oppose limits being placed on the circumstances in which common law settlement can occur.
512. It is readily acknowledged by stakeholders the common law settlement pathway is routinely used for settling statutory claims for compensation. Stakeholders claim the use of common law settlements is necessary as it:
- provides an inexpensive and expeditious option for settlement;
  - enables greater flexibility in settlement terms;
  - enables resolution of claims where liability is not accepted which:
    - reduces protracted and costly disputes; and
    - is of benefit to all parties.
513. Some stakeholders acknowledge the intent of the proposals to restrict common law settlements to genuine common law claims, and either express or imply support for the proposal on the condition the statutory settlement pathway:
- provides sufficient flexibility; and
  - accommodates those claims currently settled by common law settlement.
514. The Discussion Paper proposed a number of ‘special circumstances’ which would enable a statutory settlement to be entered into, which were generally supported by stakeholders. However, submissions identify additional areas where settlement is considered appropriate. The key matters where stakeholders submit settlement is necessary are:
- psychological injury or ‘stress’ injury claims;
  - claims that cannot be resolved through conciliation.

## Recommendation

515. The principle guiding the recommendations of WorkCover WA is to protect the interests of injured workers and the viability of the scheme. This cannot be achieved through a system that encourages unfettered lump sum settlements as a commercial agreement between parties.
516. The scheme cannot allow unfettered settlement where a lump sum becomes an expedient way of closing claim due to commercial benefits. To do so could result in:



- the purpose of the scheme being undermined, with settlement potentially becoming the default response to a claim for compensation;
  - the injury management focus of the scheme being undermined, with injured workers not rehabilitated or returned to the workplace;
  - claim costs being drawn forward, with significant impact on premium rates and scheme volatility;
  - widespread inclusion of payments unrelated to the injury (i.e. industrial relations matters).
517. The Western Australian scheme currently has the most liberal settlement arrangements of all Australian workers' compensation jurisdictions and WorkCover WA acknowledges the role settlements currently play in claims management in Western Australia. However, it is important to ensure settlements are recorded appropriately and are subject to a level of control and oversight.
518. It is therefore recommended:
- only genuine common law claims can be settled via that pathway via restrictions in procedure;
  - statutory settlements are available:
    - if a period of 6 months has elapsed after the claim was first accepted or determined; or
    - if a period of 6 months has not elapsed or the claim has not been accepted or determined, only if the settlement meets the 'special circumstances' criteria prescribed in regulations.
519. The 6 month period is similar to the current arrangements, but widened to capture 6 months from claim acceptance rather than 6 months of weekly payments. This addresses stakeholder concerns regarding the current 6 month requirement, while maintaining the intent of ensuring return to work options have been considered prior to settlement.
520. It is recognised there are particular difficulties associated with stress claims and complex claims where a liability decision is in dispute. It is recommended the concerns raised by stakeholders are accounted for in this regard by recognising these claims as 'special circumstances'.
521. The complete list of recommended 'special circumstances' to be prescribed in regulations is as follows:
- a claim by a worker under a temporary work visa (subclass 457) 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;



- a cross border claim where liability is contested in more than one jurisdiction;
  - a claim relating to an asbestos related 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 Conciliation Certificate of Outcome has been issued.
522. These recommendations accommodate stakeholder concerns by ensuring particular categories of difficult claims and disputed claims can be settled under the statutory pathway. However, the recommendations will not enable unfettered settlement of claims.
523. Procedural requirements, as outlined in the common law Part of this report, will restrict commencement of proceedings to matters where a common law election has been registered.

### Settlements

- R:82** It is recommended statutory settlements be available:
- i) if a period of 6 months has elapsed after the claim was first accepted or determined; or
  - ii) if a period of 6 months has not elapsed, or the claim has not been accepted or determined, if the claim meets the 'special circumstances' criteria prescribed in regulations.

## Discussion Paper proposals not recommended in the Final Report

### Minor claims

524. The Discussion Paper considered the creation of a pathway to enable efficient, fast track processing of minor claims. The objective is to minimise administrative and processing costs for insurers and employers associated with the numerous minor claims within the scheme.
525. The Discussion Paper proposed establishing a minor claims process for claims for expenses below an amount specified in regulations. The claims would be paid without admission of liability.
526. Stakeholder views are mixed on the proposal (6 oppose, 6 support, 4 express concerns about its operation in practice).
527. Submissions from insurers generally highlight a concern the proposal may encourage underreporting to insurers, with a risk that minor claims develop into more significant claims. CCI highlights risks associated with a large proportion of claims in the scheme being paid without a proper determination of liability, potentially impacting the integrity of the scheme and increase in costs over the longer term.
528. WorkCover WA does not recommend implementing a minor claims pathway, in consideration of the concerns expressed in submissions and the potential risks to the scheme. WorkCover WA believes the recommendations relating to pending claims will assist in the administration of minor claims.

### Persons prescribed to issue medical certificates

529. In some jurisdictions nurse practitioners and/or allied health service providers are able to issue certificates for workers' compensation purposes in certain circumstances. The Discussion Paper proposed a head of power be introduced to prescribe persons other than medical practitioners who may issue certificates in specified circumstances for workers' compensation purposes.
530. This proposal is opposed by the majority of stakeholders who highlight:
- only doctors possess the appropriate diagnostic and treatment expertise; and
  - expanding the certification power to other health professionals could increase the risk of erroneous diagnosis which could impact long term treatment and rehabilitation outcomes.
531. The proposal is therefore not recommended.

## Permanent impairment

532. A worker who has been assessed by an AMS as having a permanent impairment in accordance with Schedule 2 of the Act is entitled to lump sum compensation. In practice, injured workers only access the lump sum for permanent impairment upon settlement of their claim.<sup>3</sup>
533. The Discussion Paper proposed lump sum for permanent impairment be payable to a worker without the claim being settled. The worker's entitlement to weekly payments, medical and other expenses would continue following receipt of the sum. The worker would also be able to pursue common law damages against the employer.
534. The majority of stakeholders oppose lump sum compensation for permanent impairment being payable without settlement of the claim.
535. Stakeholders highlighted that an assessment can only occur when a worker has reached maximum medical improvement, which provides an ideal opportunity for settlement to be considered. Submissions also highlighted potential cost implications of long tail claims and workers becoming entrenched in the compensation system.
536. The proposal to enable payment of lump sum compensation for permanent impairment in the absence of a settlement will not be recommended. Stakeholders strongly support retention of the current system. The new statute will facilitate lump sum compensation for permanent impairment through settlement, which will have the effect of ceasing a worker's entitlements to statutory compensation and ending their right to seek damages against their employer.
537. Two submissions suggested that the current arrangements seem unfair and inequitable, whereby the maximum entitlement for lump sum compensation is reduced by the amount of weekly payments paid to the worker. This review does not include a review of entitlements in this regard.
538. Current provisions will be strengthened to provide procedural clarity around the election process as part of structural improvements in the new statute.

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<sup>3</sup> The Act makes provision for an arbitrator to make an order in respect of the amount of compensation payable under an election, however, WorkCover WA understands such orders are rarely, if ever, sought.

## Additional issues raised by stakeholders

### Unilateral variation of compensation

539. The Act enables an employer to apply to WorkCover WA's Conciliation and Arbitration Services for an order to suspend a worker's entitlement to compensation due to:
- failure or refusal to attend a medical examination;
  - failure or refusal to participate in a return to work program.
540. The Discussion Paper also proposed a worker's entitlement to compensation may be suspended by an employer:
- for failure or refusal to participate in a case conference;
  - for failure to provide particulars or remunerated work; and
  - if the worker is in custody or imprisoned.
541. Several submissions highlight the need for employers and insurers to more easily suspend entitlements when a worker is obstructive to the management of a claim or the injury management process. Conversely, some stakeholders feel the Act should limit the circumstances where an employer can unilaterally suspend payments, citing that the Act currently treats a worker's right to weekly payments as sacrosanct.
542. As a general principle, WorkCover WA considers it appropriate for the Act to limit the circumstances in which an employer or insurer can suspend a worker's entitlements without the involvement of an impartial decision maker. This reflects the fundamental purpose of the Act as beneficial legislation and the potential social impact of arbitrary withdrawal of entitlements.
543. A number of stakeholders submit employers should be entitled to unilaterally suspend payments if the worker has refused, obstructed or failed to comply with particular responsibilities such as attending medical examinations, without reasonable excuse.
544. WorkCover WA does not believe it is appropriate for an insurer or employer to determine whether a worker's refusal or failure to attend is reasonable. An assessment of reasonableness requires an objective examination by an impartial decision maker.

## Age limits on compensation

545. The 2011 amendments to the Act removed all age based limits on compensation. The amendments were implemented as part of the current State government's commitment to removing age based discrimination in State legislation and encouraging older workers to remain at work.
546. CCI and CoSBA submit age limits in the statute need to be revisited as a person has a natural working life and unfettered access to compensation is not consistent with this.
547. WorkCover WA recognises the challenges associated with an ageing workforce and the need to maintain skilled and experienced people. The removal of age limits in 2011 assist in achieving the objective of encouraging older workers to remain in employment.
548. Given the relatively short period since the changes were implemented, the impact of the amendments have not yet crystallised in the scheme. There is no current evidence to suggest the amendments are having a negative impact on the scheme. The impact of the amendments on the workers' compensation scheme will continue to be monitored over the coming years.

## Part 3 – Injury management

### General

549. The Injury management Part of the new statute will identify injury management obligations of each scheme participant and identify the medical and allied health services and fees available in the scheme.
550. The structure of the Injury management Part will reflect the different aspects of injury management.

### Proposed Part structure

551. The recommended high level structure of the Part is:
- General
  - Medical certificates and work capacity
  - Injury management systems
  - Return to work
  - Injury management case conferences
  - Workplace rehabilitation
  - Medical and allied health services
552. The different aspects of injury management are to be clearly defined and located in separate provisions, with the responsibilities of each participant identified therein.

### Key changes

553. The key changes recommended are:
- restructure of provisions to reflect the different aspects of injury management;
  - discontinuance of the *Code of Practice (injury management)* and incorporation of its substantive provisions in the new statute and regulations;
  - greater recognition of the injury management role of the worker's treating medical practitioner;
  - new requirements relating to the issuing of medical certificates which specify the period of incapacity together with work capacity options, to facilitate return to work;
  - new provisions to clarify the obligations of employers to provide pre-injury position or suitable duties;



- reinforcing the role of workers in the injury management process through the introduction of express obligations for injured workers to participate in:
  - the establishment of return to work programs;
  - injury management case conferences;
- renaming of vocational rehabilitation to ‘workplace rehabilitation’ and modernising the statute to reflect the contemporary framework for regulating workplace rehabilitation providers;
- discontinuance of the specialised retraining program regime;
- consolidation of compensable medical and allied health services in the Injury Management Part of the new statute and a simplified process for approving compensable health services in the future.

## Medical certificates and work capacity

### Medical certificates and work capacity

554. Under Western Australia's workers' compensation scheme, the worker's treating medical practitioner is recognised as a key party in injury management to:

- provide primary medical care to an injured worker;
- diagnose the nature of the worker's injury;
- co-ordinate medical treatment in relation to the worker's injury;
- monitor, review and advise on the worker's condition and treatment;
- advise on the suitability of, and to specify restrictions on, the work the worker may be expected to perform;
- initiate and/or take part in the development of return to work programs;
- provide medical certificates for the purposes of the Act.

555. Medical certificates are the primary mechanism for communicating information to other parties involved in injury management. Certificates inform decisions about compensation by providing information about the worker's injury and level of incapacity. Medical certificates also inform the return to work process by providing guidance about work restrictions and work 'capacity'.

556. The current Act does not include an express requirement for a medical practitioner to facilitate the return to work process by specifying in the medical certificate:

- the period of incapacity; or
- what capacity an injured worker has for work.

557. While first and final medical certificates are prescribed under the Act, the commonly used progress medical certificate has no legislative basis. Further, the current primary legislative basis for the medical certificates is to support a claim for compensation and the medical evidence for an incapacity for work rather than to facilitate injury management.

558. The Discussion Paper proposed statutory recognition of the worker's treating medical practitioner's role in injury management and importance of certifying a worker's 'capacity' rather than just their 'incapacity'. It also proposed regulations prescribe additional requirements on the issuing of certificates such as the maximum period for which a certificate can be issued.

559. These proposals intend to reinforce injury management principles and the health benefits of work in the new statute and medical certificates.



## Stakeholder Submissions

560. Stakeholders indicate strong support for the increased recognition of the worker's treating medical practitioner in injury management.
561. The proposed requirement for medical practitioners to provide more comprehensive information regarding a worker's incapacity and their capacity for work is supported by the majority of stakeholders.
562. Two submissions suggest there be a mandatory limit on incapacity periods with the worker required to prove incapacity at set intervals via medical certificates.
563. Proposals to enable regulations to prescribe requirements or conditions in respect of medical certificates and for the WorkCover WA CEO to prescribe the form of certificates are widely supported.

## Recommendation

564. The new statute will reinforce the importance of certifying the expected duration of the worker's incapacity and provide a clear legislative basis for progress medical certificates. However, WorkCover WA does not support mandatory limits on incapacity periods for workers. Incapacity periods are likely to vary depending on many factors and medical practitioners require some flexibility to specify the expected duration and review date.
565. Work is currently underway to revise WorkCover WA's medical certificates which will come into effect on 1 July 2014. WorkCover WA is engaging with the medical profession to provide guidance on their use and injury management generally.
566. The revised medical certificates and guidance material will provide for incapacity periods and suggest a medical review within 14 days of issuing a first certificate of capacity and within 28 days of issuing a progress certificate of capacity. This is considered a more appropriate response than a mandated period of incapacity imposed on the worker.

### Role of treating medical practitioner

**R:83** It is recommended the new statute recognise the injury management role of an injured worker's treating medical practitioner.

**Issuing of medical certificates and work capacity**

- R:84** It is recommended medical certificates (certificates of capacity) must:
- i) certify the injured worker's incapacity for work;
  - ii) state whether the worker has a current work capacity or has no current work capacity during the period stated in the certificate;
  - iii) specify the expected duration of the worker's incapacity.

**Medical certificate regulations**

- R:85** It is recommended regulations may prescribe requirements or conditions on the issuing and content of medical certificates.

**Form of medical certificates**

- R:86** It is recommended the new statute empower the WorkCover WA CEO to approve the form of medical certificates.

## Injury management obligations

### Code of practice

567. The *Code of Practice (injury management)* (the Code) has the status of subsidiary legislation (s155A(4)) and prescribes details regarding the establishment, content and implementation of injury management systems and return to work programs.
568. The Code contains only 6 operative clauses, is largely administrative and provides limited practical guidance to assist employers.
569. The Discussion Paper proposed the Code be repealed, with some requirements of the Code to be located in guidance material and others transferred into the new statute.
570. The Discussion Paper also proposed that regulations may prescribe further requirements in respect of injury management systems or return to work programs, if required.

### Stakeholder Submissions

571. The proposal to discontinue the Code is supported by the majority of stakeholders. While retention of key elements of the Code in the Act was generally supported, some stakeholders suggested these elements should be set out in regulations rather than the Act.

### Recommendation

572. WorkCover WA agrees that given the nature of the Code's requirements, it is appropriate for the following requirements from the Code to be incorporated into regulations.
- an injury management system is to be in writing and available to workers;
  - an employer is to actively engage with a worker in developing a return to work program and describe the program in writing;
  - a return to work program is to be modified by the employer if a medical practitioner certifies the worker's condition changes;
  - an employer is to provide copies of the program to the worker and treating medical practitioner;
  - an employer is to take reasonable steps to ensure that the actions listed in the return to work program are taken in a timely manner.
573. Additional information will be set out in guidance material to assist employers in the development of injury management and return to work programs.

574. Regulations will prescribe requirements for injury management systems and return to work programs should the need arise, in consultation with stakeholders.

#### **Code of Practice (Injury Management)**

- R:87** It is recommended the *Code of Practice (injury management)* be discontinued.
- R:88** It is recommended the key requirements outlined in the *Code of Practice (injury management)* be located in regulations.
- R:89** It is recommended the new statute enable regulations to prescribe requirements for injury management systems and return to work programs.

### **Return to work programs**

575. The Discussion Paper identified an employer may be required to establish a return to work program but there is no express requirement for a worker to participate in a program, unless an arbitrator orders a worker to participate.
576. Further, the definition of participate does not expressly include the establishment of the program. The establishment of a return to work program involves the active involvement of the worker, the employer and the worker's treating medical practitioner (at a minimum). Thus, participate should be defined to include participating in the establishment of a return to work program.

### **Stakeholder Submissions**

577. This proposal is supported by the majority of stakeholders, with several stakeholders expressing strong support.
578. A number of employer and insurer submissions highlight the need for stronger and more easily accessible punitive measures which can be applied when a worker refuses or fails to comply with a return to work program. Suggestions include:
- 'fast tracking' applications for suspension to an arbitrator;
  - introducing a penalty provision applicable to workers who do not comply;
  - extending the provision to include suspension for refusal or failure to engage in vocational assessments or work trials;
  - enabling unilateral suspension if the workers refusal or failure to participate is unreasonable.

579. One submission suggests non-treating medical practitioners should also be able to recommend establishment of a return to work program, and the worker be required to participate accordingly.

### Recommendation

580. WorkCover WA does not believe it is appropriate for an insurer or employer to determine whether a worker's refusal or failure to attend is 'reasonable' as this matter is appropriately determined in the Conciliation and Arbitration Services.
581. It would also not be appropriate or practical for non treating medical practitioners to initiate a return to work program. The treating medical practitioner is the primary person responsible for managing the worker's treatment and injury management including the return to work program. Non treating medical practitioners are used for different purposes such as employer initiated medical review of the worker.
582. It is recommended the new statute:
- expressly provide a worker must participate in a return to work program if the employer is required to establish a program;
  - extend the definition of 'participate' for the purpose of a return to work program to include participation in the establishment of a program;
  - define 'participate' in the Injury management Part.

#### Return to work programs

**R:90** It is recommended the new statute expressly provide a worker must participate in a return to work program (including its establishment) if the employer is required to establish a program.

### Injury management case conferences

583. Most Australian workers' compensation schemes recognise the importance of injury management case conferences in improving return to work outcomes. The case conference facilitates early discussion and development of an action plan for how each conference participant can assist the injured worker to return to work.
584. Cooperation and consultation in injury management is vital to enable all parties to have a shared understanding about:
- potential barriers to return to work;
  - rehabilitation and return to work expectations;
  - available support;
  - planned activities.

585. A case conference is not a medical consultation but a meeting which encourages early communication between parties in the return to work process. Early intervention and ongoing communication has been shown to lead to optimal rehabilitation outcomes.
586. Case conferences are often used in Western Australia, but they are not recognised or regulated within the legislation.
587. To increase recognition of the importance of case conferences in injury management, the Discussion Paper proposed the new statute include a requirement for an injured worker to attend an injury management case conference if requested by the employer, or the employer's insurer, for the purpose of:
- establishing or amending a return to work program;
  - discussing suitable duties and reaching a shared understanding of workplace issues, barriers and return to work opportunities;
  - clarifying any issues or actions identified in a medical certificate or return to work program.

### Stakeholder Submissions

588. The vast majority of stakeholders support recognition of injury management case conferences in the Act.
589. However, some submissions propose variations to the proposal:
- mandatory attendance of the workplace rehabilitation provider;
  - mandatory attendance of the worker's legal representative;
  - strengthened provisions for immediate suspension of payments for failure to attend;
  - the inclusion of liability questions in a case conference;
  - exception to the obligation if a case conference is not in the best interests of the worker, e.g. stress or bullying claims.
590. UnionsWA oppose the proposal, citing experiences where case conferences are conducted in an intimidating environment which may not reflect the best return to work outcomes for the worker. If progressed UnionsWA propose workers invite a legal representative, conferences be conducted on a without prejudice basis and a code of practice be developed and enforced for participants.
591. Slater & Gordon oppose the proposal indicating the worker's consent should be required and legal representation should be available to assist the worker if liability issues are raised.

## Recommendation

592. Case conferences are an integral part of the injury management process and it is important the new statute provide for them.
593. It is not appropriate for workers to be advised not to attend case conferences to discuss genuine injury management issues. It is also not appropriate for case conferences to be used for the purpose of discussing liability issues as the Act provides alternative mechanisms for consideration of these issues.
594. The purpose of the case conference will be specified in the new statute and WorkCover WA will develop guidelines supporting the case conference provisions to assist in their proper use in the scheme to promote active injury management.
595. In respect of who may attend, there is no intention to limit potential participants. There will be a minimum requirement that the worker, their treating medical practitioner and either the employer or insurer are in attendance. WorkCover WA acknowledges workplace rehabilitation providers and other allied health practitioners should, and will, be in attendance where necessary.
596. The frequency and number of conferences will be limited by regulations in the same manner as insurer-initiated medical examinations.
597. The new statute will also include a protection where a worker will not be required to attend a case conference if their treating medical practitioner believes it is not in the best interests of the worker to attend. This will be particularly relevant in psychological injury claims where exposure to the employer could be detrimental to the worker's health.
598. In terms of punitive measures for a worker's non-attendance, WorkCover WA does not believe it is appropriate for an insurer or employer to determine whether a worker's refusal or failure to attend is 'reasonable'. An assessment of reasonableness requires an objective examination through the Conciliation and Arbitration Services.

### **Injury management case conferences**

- R:91** It is recommended a worker be required to attend an injury management case conference if requested by the employer or insurer for the purpose of:
- i) establishing or amending a return to work program;
  - ii) discussing suitable duties and reaching a shared understanding of workplace issues, barriers and return to work opportunities;
  - iii) clarifying any issues or actions identified in a medical certificate or return to work program.
- R:92** It is recommended an injury management case conference must be attended by the worker, the worker's treating medical practitioner, and either the employer or the insurer or both.
- R:93** It is recommended an injury management case conference must not be utilised for the purpose of obtaining a medical examination or medical report or to determine questions of liability.
- R:94** It is recommended if a worker refuses or fails to attend an injury management case conference without reasonable excuse, an order may be sought in the Conciliation and Arbitration Services to suspend the worker's weekly payments.



## Pre injury position, suitable duties and dismissal

### Provision of pre-injury position and suitable duties

599. The majority of Australian workers' compensation jurisdictions require an employer to keep a worker's pre-injury position available to the worker, generally for 12 months. It is a fundamental principle of effective injury management and rehabilitation for a worker to be provided with an opportunity to return to their pre-injury employment.
600. Section 84AA obliges an employer, for a 12 month period of a worker's incapacity:
- to keep the worker's position available if reasonably practicable (s84AA(1)(a)); or
  - if the position is not available or if the worker does not have the capacity to work in their pre-injury position, to provide a position that is suitable in terms of the worker's qualifications, capabilities, pre-injury status and remuneration (s84AA(1)(b)).
601. The Discussion Paper proposed the general intent of the current s84AA be retained through two new provisions outlining the requirement to provide to the worker, if he or she attains capacity:
- the pre-injury position; or
  - suitable alternate duties if the pre-injury position cannot be performed.
602. It was proposed the obligation will not apply if:
- the worker has been lawfully dismissed - this will break the nexus between the obligations under the provisions and industrial relations matters; or
  - it is unreasonable or impracticable for the employer to comply with the provisions.
603. It was also proposed the obligation will apply for 12 months beginning on the first day the worker becomes totally or partially incapacitated by a workplace injury. This will resolve existing ambiguity in the current Act provisions around when the 12 month period begins.
604. Suitable duties are duties which:
- the worker is qualified to engage in;
  - the worker is capable of performing;
  - are comparable in pay and status to the pre-injury position (consistent with the current terms of s84AA(1)(b)).

## Stakeholder Submissions

605. The majority of submissions support the proposal to require employers to provide the worker with their pre-injury position or suitable duties for 12 months after the worker is first incapacitated, subject to a reasonableness test being maintained. Some submissions raise concerns about the impact of the obligation on small business, and others suggest suitable duties should extend to suitable employment with another employer, such as a work trial.

## Recommendation

606. There is no intention to expressly define suitable duties, as the obligation is based on what is reasonable, which could include options such as return to work trials.

607. It is recommended the proposed amendments described in the Discussion Paper proceed. In identifying suitable duties for the worker, an employer is to have regard to the following:

- nature of the worker's injury and incapacity;
- pre-injury employment with the employer;
- worker's age, education, skills and work experience;
- worker's place of residence;
- the return to work program implemented for the worker, if any.

### Pre-injury position and suitable duties

**R:95** It is recommended the new statute clarify, where a worker attains partial or total capacity for work, the employer is to provide the worker with their pre-injury position.

**R:96** It is recommended the new statute clarify, where a worker attains partial or total capacity for work but is unable to perform their pre-injury position, the employer is to provide suitable duties to the worker.

**R:97** It is recommended the obligation to provide the pre-injury position or suitable duties apply if it is reasonable or practicable for the employer. The obligation will not apply if the worker has been lawfully dismissed.

**R:98** It is recommended the new statute clarify the requirement to provide the pre-injury position or suitable duties continues for 12 months, commencing when the worker is first totally or partially incapacitated from work.

## Dismissal of injured worker

608. Employers involved in reasonable disciplinary matters with an employee prior to a worker's incapacity may be limited in continuing their investigations to the point of dismissal. The operation of s84AA may also limit employers from managing redundancies and reasonable variations to the structure of their workforce.
609. The Discussion Paper proposed within 12 months after a worker is first incapacitated from work, an employer must not dismiss a worker solely or mainly because the worker is not fit for employment in a position because of the injury (see s232B of the *Workers Compensation and Rehabilitation Act 2003* (Qld)).
610. The Discussion Paper also proposed an employer be required to notify WorkCover WA if a worker is to be dismissed within 12 months.
611. This proposal will make it clear that a worker must not be dismissed on the basis of a workplace injury and separates this concept from the requirement to provide the pre-injury position or suitable duties, which are fundamentally injury management provisions. The provision will not impact any protections that exist under any other law.

## Stakeholder Submissions

612. Stakeholders generally support the proposal to include a provision in the new Act prohibiting dismissal of a worker solely or mainly due to the injury.
613. Opposition to the proposal indicates industrial relations legislation already provides this protection for workers and the provision will limit an employer's capacity to terminate an employee within the 12 months.
614. Submissions also question why WorkCover WA needs to receive a notice of a worker's dismissal within the 12 month period (section 84AB).

## Recommendation

615. The recommended dismissal provision is not intended to replace or modify existing industrial relations legislation. Some Australian jurisdictions enable a worker to seek reinstatement and other remedial action via their workers' compensation legislation. There is no intent to introduce such a provision in Western Australia. However, the provision will make it clear to both workers and employers a worker is not to be dismissed solely or mainly due to their injury. It is important this principle is clear to both workers and employers and recognised accordingly in the Act.

616. The notice of dismissal is primarily used to enable WorkCover WA to provide information to the worker. Alternative options for provision of this information to workers will be considered in the drafting of the new statute, such that an employer will not be required to issue a notice to WorkCover WA.

**Dismissal of injured worker**

**R:99** It is recommended the new statute clarify that an employer must not dismiss a worker solely or mainly because the worker is not fit for employment in their pre-injury position because of the injury. The prohibition is to apply for a period of 12 months after a worker is first totally or partially incapacitated from work.

**R:100** It is recommended the requirement to provide notice of a worker's dismissal to WorkCover WA be discontinued.

## Workplace rehabilitation

### Workplace rehabilitation

617. The Discussion Paper proposed the introduction of a contemporary definition of ‘workplace rehabilitation’ to replace the use of the term ‘vocational rehabilitation’, which is outdated:

***Workplace rehabilitation** means the provision by an approved workplace rehabilitation provider of services for the benefit of the worker aimed at return to work, in accordance with service items, standards and performance criteria established by WorkCover WA.*

618. WorkCover WA approves vocational rehabilitation providers subject to such conditions, if any, as it sees fit to impose. The Discussion Paper proposed the introduction of an improved regulatory regime for workplace rehabilitation providers.

### Stakeholder Submissions

619. The introduction of the term ‘workplace rehabilitation’ is supported by the majority of stakeholders and is recommended in the new statute.

620. Stakeholders support the introduction of a clear regime for regulation of workplace rehabilitation providers. Several stakeholders commented on regulatory or performance issues, such as in house referrals, qualification requirements to provide services and the monitoring/audit process. The issues raised can be addressed under the recommended regulatory framework and do not need to be addressed legislatively.

## Recommendation

### Regulation of workplace rehabilitation providers

**R:101** It is recommended the new statute empower WorkCover WA to:

- i) subject to criteria and conditions, approve a workplace rehabilitation provider for a period not exceeding three years;
- ii) suspend or revoke an approval;
- iii) impose conditions on an approval;
- iv) define services taken to be ‘workplace rehabilitation’.

**R:102** It is recommended the new statute empower WorkCover WA to:

- i) establish performance standards for workplace rehabilitation providers generally or specifically and monitor compliance with those standards;
- ii) adopt the provisions of other publications for the purpose of setting eligibility criteria for approval, and ongoing conditions and performance standards.

## Specialised retraining programs

621. Specialised retraining programs were introduced as part of the 2004 amendments to the Act. The amendments enabled a worker to undertake formal vocational training and/or study through technical or tertiary institutions or training courses of no longer than three years duration.
622. The amendments intended to assist the small number of workers with a WPI above 10% but less than 15%, who are unable to pursue common law damages.
623. The entitlement to engage in a specialised retraining program has not been accessed by any worker since the introduction of the entitlement.
624. No other workers’ compensation jurisdiction in Australia provides an entitlement of a similar scale with similar conditions.
625. In consideration of the separate entitlement available for workplace rehabilitation (7% of the prescribed amount), the Discussion Paper proposed removal of the specialised retraining program regime.

## Stakeholder Submissions

626. The majority of submissions support the removal of the regime, given the entitlement has never been accessed.
627. Three stakeholders do not support the discontinuation of specialised retraining programs and suggest the access thresholds be removed.

628. Various submissions suggest alternatives to support retraining, including:
- quarantining part of the workplace rehabilitation entitlement for retraining purposes;
  - development of an employer incentive program to facilitate redeployment of injured workers.

### Recommendation

629. WorkCover WA's view is that retraining can be accommodated within the workplace rehabilitation entitlement but does not believe quarantining part of the entitlement for retraining purposes will deliver better return to work outcomes for workers. Retraining is already one of many potential options under the existing workplace rehabilitation entitlement and flexibility is needed as to what service is most appropriate for the injured worker's return to work.
630. Scheme data indicates that on average, lost time claims exhaust less than 50% of the vocational rehabilitation entitlement. There does not appear to be a need to quarantine part of the entitlement given the entitlement is rarely exhausted.
631. The introduction of an employer incentive program for redeployment is not recommended by WorkCover WA. Western Australia has comparable return to work rates with other jurisdictions and there is minimal data on the efficacy of employer incentive programs to justify a potentially significant increase in premium rates and scheme costs.

#### **Specialised retraining programs**

**R:103** It is recommended the specialised retraining program regime be discontinued.

## Medical and allied health services

632. The legislative framework relating to compensable medical and health services spans various sections of the Act and statutory instruments including regulations and ministerial declaration.
633. The Discussion Paper proposed a number of improvements in structure and clarity in regulatory powers, in respect of medical and allied health services, including:
- regulation making power to prescribe services, the persons who may provide the services and the qualifications or experience required;
  - consolidation of all approved services in the new statute, including the regulatory power for setting scales of fees.

### Stakeholder Submissions

634. Stakeholders support the ability for regulations to prescribe services, persons who may provide the services and the qualifications or experience required. Submissions request WorkCover WA reconsider the approval criteria for particular allied health providers who may not be recognised (including psychologists with general registration) and those which may require adjustment to reflect current registration requirements (exercise physiologists). The proposal is to introduce an enabling provision. It is not the current intention to modify who is able to offer services in the scheme. WorkCover WA will undertake appropriate consultation with relevant interest groups prior to any regulatory change.
635. Stakeholders support the consolidation of approved services and the fee setting power for medical and allied health services. A number of submissions take the opportunity to comment on the current prescribed rates, including issues around gap payments and adherence to market rates. This review does not intend to modify the current rates and WorkCover WA will consult with relevant interest groups when the fees are annually reviewed.



## Recommendation

### **Medical and allied health services**

**R:104** It is recommended the new statute enable regulations to prescribe:

- i) compensable health services;
- ii) the class of professionals eligible to provide compensable services;
- iii) any qualifications or experience a person requires to give or provide a compensable service to an injured worker.

### **Medical and allied health fees**

**R:105** It is recommended the Injury Management Part of the new statute contain the regulation making power to fix scales of fees for medical and health services.

## Discussion Paper proposals not recommended in Final Report

### Definition of return to work

636. The Discussion Paper proposed the term ‘return to work’ be defined in the Injury Management Part of the new statute, rather than the general definitions section.
637. Submissions not supporting the proposal highlight principles of return to work span the entire Act and should accordingly be identified in the general definitions section of the Act. WorkCover WA is persuaded by this argument and the definition of return to work will remain located in the definitions section of the new statute.

### Health services directions

638. The Discussion Paper proposed the new statute enable WorkCover WA to issue directions:
- establishing rules to be applied in determining whether a treatment or service is reasonably necessary;
  - limiting the kinds of treatment and service (and related travel expenses) for which an employer is liable;
  - establishing standard treatment plans for the treatment of particular injuries or classes of injury.
639. The power to issue directions or guidelines of this kind is consistent with the approach adopted in many Australian workers’ compensation schemes. The Discussion Paper highlighted there is no intention to intervene in the clinical decisions of medical and allied health providers. However, there is a need for WorkCover WA to be able to issue directions or publish guidelines on particular issues where this is in the best interests of the scheme.
640. While a number of submissions support the proposal, the majority of submissions from medical stakeholders express concerns with directions that would impact on the clinical independence of doctors, jeopardise injury management and limit innovations in treatment.
641. WorkCover WA will not recommend the proposal in the absence of support from the medical community. WorkCover WA may consider issuing guidance in the future however this does not need to be addressed legislatively.

## Additional issues raised by stakeholders

### Pain management programs

642. The Australian Pain Society made a number proposals to promote and encourage early referral to pain management programs, including:
- WorkCover WA giving specific and enforceable guidelines for assessment of biopsychosocial risk and evidence based management;
  - ensure GPs and/or insurers conduct the short-form Orebro within weeks post-injury to identify injured workers at highest risk of poor or delayed outcomes and manage accordingly with a multidisciplinary (biopsychosocial) approach;
  - promote wide-spread education of scheme stakeholders in a biopsychosocial approach to injury management;
  - assist the streamlining of private and publically funded services with insurers which will assist with injured workers accessing health services earlier and equitably.
643. The Faculty of Pain Medicine, Australia and New Zealand College of Anaesthetists, also called for the workers' compensation scheme in Western Australia to recognise the factors that contribute to persistent pain and impairment and make early multidisciplinary assessment and management mandatory.
644. WorkCover WA does not support mandatory referral to pain management programs or the proposal to issue enforceable guidelines. WorkCover WA does not direct or prescribe particular interventions or claim related referrals and is mindful of the concerns within the medical profession of issuing enforceable directions or guidelines relating to treatment.
645. Non legislative options could be pursued for injury management parties to discuss the referral and use of pain management programs and increase awareness of return to work outcomes.

### Employer attendance at medical appointments

646. UnionsWA proposed a prohibition on employers and their legal representatives attending appointments with medical practitioners.

647. WorkCover WA's view is this issue does not require a legislative response. The worker's treating medical practitioner may wish to discuss injury management issues with the employer and should have discretion as to when it is appropriate to include an employer in a medical appointment.

### Liability for work trials with host employers

648. ARPA proposed work trial insurance is considered due to a lack of clarity in relation to workers' compensation insurance cover for workers engaging in a work trial with a host employer for rehabilitation purposes. It was suggested the lack of clarity can cause delays and result in host employers withdrawing an interest to accommodate an injured worker on a work trial.
649. In a work trial situation the host employer does not have a contractual arrangement with the worker but has agreed to host the worker within their workplace which may be for the purpose of work experience, retraining or work hardening. Workers usually receive workers' compensation payments paid by their pre-injury employer for the duration of the work trial.
650. An informal industry position was agreed a number of years ago and the then Workers' Compensation and Rehabilitation Commission released a bulletin which stated:
- the insurer of the original employer be held liable for any injury of a rehabilitee sustained while under an approved vocational rehabilitation programme-unless negligence can be shown against the new employer. In cases where negligence is an issue the original employer should be held liable until it is proved the subsequent employer is in fact negligent. At present there is no specific legislation outlining the conditions for the above therefore the cooperation and support of all insurers and self-insurers is requested.*
651. Although the bulletin has been withdrawn there is an informal industry understanding that insurers continue to cover an existing injury and any new injury sustained while the worker is participating in an approved work trial. However, there is no legislative basis for this informal practice.
652. WorkCover WA supports legislative clarity on this issue to avoid any potential concerns about liability for an aggravation of an existing injury or any new injury sustained while on a work trial. This should also be extended to situations involving host employers engaged as a part of a return to work program generally.
653. The provision will only apply where the worker is not remunerated by the host employer.

654. The new statute will also clarify the obligation relates to liability for statutory compensation and not common law damages. This means host employers will still require public liability insurance in relation to any common law claim made by the worker against the host employer.

#### **Work trials with host employers**

- R:106** It is recommended the new statute clarify employers liable to pay compensation to workers are to remain liable for any aggravation of an existing compensable injury or any new injury sustained by workers when engaged on a work trial or in association with a return to work program with a new (host) employer.
- R:107** It is recommended the new statute clarify insurers are required to indemnify employers for injuries to workers sustained on work trials and return to work programs with host employers.
- R:108** It is recommended the extended liability and indemnity for work trials and return to work programs with host employers not apply to any action for damages against the host employer.

## Part 4 – Medical assessment

### General

655. The Medical Assessment Part of the new statute will establish:

- powers to approve and regulate AMS;
- processes for evaluation of impairment;
- processes for convening medical panels.

### Proposed Part structure

656. The proposed high level structure of the Part is:

- Assessing degree of impairment
- Approved Medical Specialists
- Medical assessment panels
- Medical advisory committee

### Key changes

657. The key changes to the current Act are:

- more effective regulation of AMS;
- introduction of a simplified and consolidated process for the management of all types of medical panels;
- WorkCover WA be empowered to appoint medical practitioners to the medical advisory committee.

## Approved Medical Specialists

### Approved Medical Specialists

658. AMS play a key role in the scheme and are responsible for the assessment of the degree of permanent impairment of a worker for the purpose of determining:
- Schedule 2 entitlements;
  - access to common law damages;
  - participation in specialised retraining<sup>4</sup>;
  - eligibility to receive extension of medical expenses entitlements.
659. The Discussion Paper proposed more effective regulation of AMS by WorkCover WA through the introduction of a new regulatory framework. The proposals included:
- approval of AMS for a 3 year period;
  - WorkCover WA ability to require an AMS to produce impairment assessments for inspection and review;
  - WorkCover WA ability to impose conditions on AMS approvals and suspend or revoke approvals for non-compliance with conditions.

### Stakeholder submissions

660. The proposal to introduce a more comprehensive regulatory framework for AMS is supported by the majority of stakeholders.
661. Stakeholders submit WorkCover WA's powers in relation to regulation and placing conditions on AMS only be taken on advice from WorkCover WA's medical committee. It is further submitted an appeal to an independent expert arbitrator be available to AMS affected by WorkCover WA decisions.
662. A submission indicated that use of the term 'Specialist' is not appropriate in the context of AMS, given some AMS have not completed training in a recognised field of specialty and should not be using the term 'Specialist'.

### Recommendations

663. WorkCover WA will continue to seek advice from the Medical Committee when it is required.

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<sup>4</sup> It is recommended that specialised retraining programs be discontinued in the new statute.

664. WorkCover WA publishes the WorkCover WA Guides and regulates their application. Given the centrality of the AMS system to the workers' compensation scheme it is appropriate that WorkCover WA has the capacity to:
- establish an approval framework;
  - approve an AMS for a period not exceeding 3 years;
  - impose conditions on approvals;
  - suspend or revoke an approval.
665. The comments in relation to the use of the word 'Specialist' are accepted and the new statute will introduce a new term. The recommended term is Approved Permanent Impairment Assessor (APIA). However, WorkCover WA will consult with stakeholders on the appropriate terminology during the drafting of the new statute.

#### **Regulation of Approved Medical Specialists**

**R:109** It is recommended the new statute authorise WorkCover WA to establish a regulatory framework for Approved Medical Specialists.

**R:110** It is recommended Approved Medical Specialists be approved for a 3 year period.

**R:111** It is recommended the WorkCover WA CEO be empowered to require an Approved Medical Specialist to produce impairment assessments for inspection and review on request.

**R:112** It is recommended the new statute include an express power for WorkCover WA to place conditions on the approval of an Approved Medical Specialist, and suspend or revoke an approval for non-compliance with conditions.

**R:113** It is recommended the new statute replace the term 'Approved Medical Specialist' with 'Approved Permanent Impairment Assessor (APIA)'.

### **Evaluation of impairment**

666. An AMS who has assessed a worker is required to provide both a report and a certificate to the worker and the employer. The Act requires the report to state the worker's degree of impairment and to include details and justification of the assessment. Essentially a certificate restates the assessment that should be provided in the report. Structural and administrative improvements in the new statute will enable an AMS to issue a combined report and certificate.



## Panels and advisory committee

### Medical assessment panels

667. The Legislative Review 2009 found there was a high level of duplication in the Act in relation to medical panels.
668. The Discussion Paper proposed that:
- consistent with the appointment of AMS, WorkCover WA be able to approve a medical practitioner as eligible to sit on a medical panel;
  - the CEO convenes and appoints the Chairperson of all medical panels;
  - separate provisions for AMS panels be discontinued.

### Stakeholder submissions

669. The proposals to introduce a simplified and consolidated process for medical panels are supported.

### Recommendations

670. The streamlining of the administration of medical panels is aimed at increasing the efficiency of the process and WorkCover WA does not anticipate a negative impact on timeframes or an increase in associated costs.

#### Medical Assessment Panels

- R:114** It is recommended the new statute empower the WorkCover WA CEO to approve a medical practitioner eligible to be a member of a medical assessment panel.
- R:115** It is recommended the new statute empower the WorkCover WA CEO to convene and appoint the Chairperson of all medical assessment panels.
- R:116** It is recommended separate provisions for Approved Medical Specialist panels be discontinued.

### Medical Advisory Committee

671. The Medical Advisory Committee's role is to advise WorkCover WA on matters relating to the *WorkCover Guides for the Evaluation of Permanent Impairment* and assessment of matters of a medical nature.

672. The current Act empowers WorkCover WA to appoint a Medical Advisory Committee. Appointment of medical practitioners to the Medical Advisory Committee currently requires consultation with or nomination by the Australian Medical Association Western Australia (AMA WA) and Ministerial approval.
673. The Discussion Paper proposed WorkCover WA be empowered to appoint medical practitioners to the Medical Advisory Committee. The Discussion Paper also indicated WorkCover WA will consult with any organisation it considers has a relevant interest regarding appointment of medical practitioners to the committee.

### Stakeholder submissions

674. While this proposal is supported by stakeholders, it was submitted that WorkCover WA should consult with any ‘medical organisation’ with a relevant interest, rather than ‘any organisation.’
675. WorkCover WA agrees with this submission, which will be addressed in the drafting of the new statute.

### Recommendation

#### Medical Advisory Committee

**R:117** It is recommended the new statute empower WorkCover WA to appoint medical practitioners to the Medical Advisory Committee.



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## Part 5 – Liability and insurance

### General

676. The Liability and insurance Part of the new statute will establish the workers' compensation liabilities of employers and associated insurance obligations. The Part will also provide for the approval of insurers and self insurers, and processes for fixing recommended premium rates.

### Proposed Part structure

677. The proposed high level structure of the Part is:

- General
- Employers' liability and insurance obligations
  - Employers' obligation to insure
  - Deemed employers
- Licensed insurers
  - Licensing and renewal
  - Insurers' obligations
- Self insurance
- Premium rates
- Safety net
- Acts of terrorism

### Key changes

678. The key changes proposed to the current Act are:

- the form, terms and conditions of standard employer indemnity policies to be regulated along with policy endorsements or extensions;
- specific provision for 'burning cost policies';
- prohibiting insurance under the Act (policy endorsements) extending to contractual indemnities to third parties for their negligence (other than a principal indemnified under s175(2));
- simplification of wage declaration requirements for contractors;
- WorkCover WA to be responsible for approval of insurers and self insurers;

- clarification of the status of ICWA and public authorities;
- changes to the insurance regime for industrial disease liabilities of mining employers;
- integration of the *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001* with amended provisions relating to the definition of 'act of terrorism', liability cap, and claim process.

## Terminology

679. Some sections of the Act refer to a 'policy of insurance' although the term is not defined in the Act (ss160(1) and (2), 101(e)). Other sections refer to the 'policy or contract of insurance' (ss160(3a) and (4), 171). Further, s5(1) defines 'contract of insurance' to include a cover note.
680. There is no basis in the Act for distinguishing between a 'policy of insurance' and a 'contract of insurance'. The preferred approach is to use the term 'policy of insurance' which will be defined to include the proposal for insurance, cover note, contract of insurance, the employer indemnity standard wording, policy schedule and policy extensions. These will all form part of the 'policy of insurance' employers are required to effect or renew.
681. There was no stakeholder opposition to this proposal.

### **Policy of insurance - terminology**

**R:118** It is recommended the new statute refer to 'policy of insurance' throughout, rather than 'contract of insurance.'

## Employers' obligations

### Scope of duty to insure

682. No changes are proposed to the general scope of an employer's liability to insure. The existing legislation provides sufficient clarity and certainty.
683. By virtue of a standard policy of insurance imposed on insurers by WorkCover WA in 2011 and underpinned by regulations, employers are not required to insure for:
- an aggregate amount of damages exceeding \$50 million arising out of all claims in respect of a single event;
  - liability to pay compensation or damages arising out of events such as war, military or usurped power;
  - liability to pay damages in respect of injuries occurring outside of Australia or in a jurisdiction outside of Australia; or
  - any liability to pay compensation or damages in respect of specified industrial diseases arising from employment in any mine or mining operation.<sup>5</sup>
684. The scope of the war exclusion is very broad and would appear to capture even minor events. The Discussion Paper proposed the exclusion for war be removed and workers' compensation insurance policies be required to indemnify claims arising out of war and other hostilities.

### Stakeholder Submissions

685. WorkCover WA received a varied response to the proposal. Stakeholders supporting the proposal highlight the limitation does not exist in other jurisdictions and 'war' can be difficult to define. Stakeholders opposing the change highlighted approved insurers are not able to obtain reinsurance which covers war and other hostilities as this is specifically excluded by the AAA rated reinsurance market.
686. In consideration of the concerns raised by stakeholders, this proposal will be reconsidered in consultation with the industry. WorkCover WA understands reinsurance and treaty arrangements wording can vary significantly. The proposal can be affected by amendments to regulations and the viability of the proposal will be examined in the development of regulations under the new statute.

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<sup>5</sup> The Insurance Commission of Western Australia is the only insurer authorised to issue policies insuring against liability to pay compensation for these diseases (s162)

## Remuneration and records

687. The Act requires employers to provide an estimate of the aggregate amount of ‘remuneration’ payable at the commencement of a policy period and verify the actual amount at renewal (usually 12 months), at which time a premium adjustment may be required for any significant variation.
688. Both WorkCover WA and licensed insurers may, in certain circumstances, require an employer’s remuneration records to be audited.
689. The Discussion Paper proposed the new statute enable WorkCover WA or an insurer to recover inspection costs where an audit reveals a significant understatement of workers employed and/or remuneration.

## Stakeholder Submissions

690. The majority of submissions express conditional support. The conditional support is based on the need to ensure the ‘prescribed circumstances’ capture only deliberate or wilful under-declaration by employers. This condition will be considered in the development of regulations under the new statute.
691. Two submissions suggest offence provisions be introduced around failure to provide information and related matters. Failure to provide information and under declaration is already an offence under the Act and WorkCover WA has the power to issue infringement notices for these offences under recent changes to the principal regulations.

## Recommendation

### Audit of remuneration declarations

**R:119** It is recommended the new statute provide in prescribed circumstances audit costs incurred by WorkCover WA or an insurer be recoverable from an employer.

## Record keeping requirements

692. Consistent with the approach adopted in most Australian workers’ compensation jurisdictions, the Discussion Paper proposed the introduction of record keeping requirements for employers in relation to workers’ compensation insurance, specifically details relating to workers employed and remuneration. Such records are required to ensure accurate statements at policy inception and renewal. Most workers’ compensation jurisdictions require employers to maintain and supply certain records for insurance and compliance purposes.

## Stakeholder Submissions

693. The majority of stakeholders support this proposal. One stakeholder suggests the Act define the records to be kept. Another stakeholder suggests it is important to align the record of remuneration by industry classification (ANZIC) to support data collection and premium assessment requirements.

## Recommendation

694. It is recommended the record keeping requirements are clarified so they apply only to records required for compliance with the Act (statements of remuneration) and to effect an insurance policy (declarations made by the employer in relation to their trade or business as part of the policy of insurance).

### Remuneration declarations – record keeping

**R:120** It is recommended the new statute require employers to make and maintain correct records of remuneration of all ‘workers’ employed by the employer and the employer’s industry class on the basis of which an insurer charged premium.

**R:121** It is recommended the new statute require records of employment be retained for 7 years from the date the record was first created.

## Insurance obligations of deemed employers

695. Sections 5(1), 160(2) and 175 have the effect of requiring contractors and principals to both declare the remuneration of the contractors’ workers for work related to the trade or business of the principal. This creates a situation where it may be possible for insurers to levy a full premium in respect of the same subcontractor on the principal and any contractors in the contract chain.

696. In practice, principals generally require contractors to obtain a policy of insurance which provides indemnity to the principal under the contractor’s policy. Section 175(2) supports this practice in providing a statutory indemnity to the principal from the contractor for the principal’s liability under s175.

697. During the 2009 legislative review insurers advised that principals’ remuneration declarations separately identify the remuneration paid by contractors to their workers. The remuneration amount attributable to the principal’s contractors is typically discounted by up to 50 per cent in the calculation of the premium payable by the principal.



698. As an alternative, insurers may apply a small additional levy (in the order of 5% of premium) to the policies of contractors to cover the costs associated with indemnifying principals.
699. The Discussion Paper proposed changes that may assist in reducing the premium payable where prudent insurance arrangements are in place:
- the relevant contractor's insurance policy is extended to indemnify the principal for liabilities under s175;
  - the principal has evidence of the relevant contractor's valid certificate of currency and principal indemnity extension;
  - the principal verifies this information at commencement and renewal of their own insurance policy.

### Stakeholder Submissions

700. The majority of stakeholders support the proposal. Two stakeholders queried the relevance of listing as a condition the relevant contractor's insurance policy is extended to indemnify the principal for liabilities under s175. It is suggested this was largely irrelevant due to the statutory indemnity given to the principal under s175(2).

### Recommendation

701. This proposal seeks to resolve the situation of principals having to declare the remuneration of a contractor's workers in specific circumstances. The requirement to declare the contractor's remuneration currently applies even if the principal is indemnified by the contractor. While it is correct the Act provides an indemnity for principals in relation to liabilities under s175 it is not clear at the point of effecting or renewing a policy what specific contractors the principal has engagement with that may give rise to a liability (and indemnity protection) under the Act.
702. It is therefore important the new statute provide transparency in the insurance arrangements between principals and contractors if the obligation on the principal to declare remuneration is to be removed. This can only be achieved where there is evidence the relevant contractor's insurance policy is extended to indemnify the principal.

### Remuneration declarations in the contract chain

**R:122** It is recommended the new statute not require a principal within the meaning of s175 of the current Act to estimate and verify remuneration details of contractors' workers if:

- i) the relevant contractor's insurance policy is extended to indemnify the principal for liabilities under s175;
- ii) the principal has evidence of the relevant contractor's valid certificate of currency and principal indemnity extension;
- iii) the principal verifies this information at commencement and renewal of their own insurance policy.

## Safety net claims – principals

703. While most employers have workers' compensation insurance, the Act provides certain 'safety net' arrangements in the event of an injury to a worker employed by an uninsured employer. Until recently access to the safety net was limited to statutory compensation. However, legislative amendments enacted in 2011 broadened access to include common law damages.
704. The legislative framework for the safety net is provided for in ss 174 to 174A of the Act. The provisions work well although certain amendments are proposed to improve speed of access where a principal contractor is involved.
705. Access to the General Account is, and should be regarded as, a safety net of last resort. This is particularly relevant in cases involving an uninsured contractor where there may be liability imposed on a principal under s175. The intention of s175 is to ensure a worker of an uninsured contractor is covered by the principal.
706. A remedy under s174 (payment from the General Account) should be made subject to exhausting rights under s175, otherwise the General Account effectively underwrites the principal's liability – contrary to deeming and insurance provisions of the Act.
707. Most claims involving uninsured contractors are eventually paid by principals. However, there has sometimes been significant delays before the liability is met and payments are made to injured workers. There a number of causes for this:
- a reluctance by some principals to accept liability;
  - principals being brought into the claims process and proceedings at a late stage, sometimes after an award is made against the uninsured employer to pay compensation;

- technical arguments regarding whether a principal is automatically deemed the ‘employer’ and required to make payment where the uninsured contractor cannot;
- legal disputes regarding whether the liability of a principal to pay compensation only applies if an award is made against them directly.

708. The Discussion Paper proposed:

- the new statute require a principal contractor to be made a party to proceedings if WorkCover WA is made aware the principal contractor may have a liability; and
- the new statute strengthen the obligation of a principal contractor to make payments to a contractor’s workers in the event the contractor is uninsured.

### Stakeholder submissions

709. The majority of stakeholders support the proposals. ICWA does not support the proposal requiring the principal to make payments to an injured worker of an uninsured employer with whom the principal is jointly and severally liable and CCI indicated qualified support provided the statute clarifies it only applies where the uninsured employer is unable to pay.

### Recommendation

710. It is important the Act reinforce the obligation of principal contractors to make compensation payments to injured workers of uninsured employers with whom they have a joint and several liability. The capacity of the uninsured employer to pay is usually determined in the early part of proceedings and it is recommended the principal must make payment within 30 days of the award of compensation to the worker, before the WorkCover WA General Account is required to meet the payment to the worker.

#### **Obligation on principal to pay compensation where employer uninsured**

**R:123** It is recommended the new statute require a principal contractor to be made a party to proceedings if WorkCover WA is made aware the principal contractor may have a liability under the Act.

**R:124** It is recommended the new statute require a principal contractor to pay compensation due to a worker of an uninsured employer (with whom the principal is jointly and severally liable), irrespective of whether an award is made against the direct employer only.

## Contractual indemnities

711. Contractual indemnities are a risk transfer mechanism and are often used in commercial contract negotiations.
712. While indemnities may take various forms, the general intention is to protect the recipient of the indemnity (e.g. a principal contractor) from any legal liability, loss, claim or proceeding in respect of personal injury to contractors and their workers.
713. Of particular concern is an emerging demand by principal contractors in large scale projects for much broader workers' compensation insurance extensions to the traditional 'upward indemnity' between a principal and contractor.
714. The arrangement involves an upward indemnity between principal and contractor and also a 'sideways' or mutual indemnity for common law liability between all contractors engaged on the same project. The sideways indemnity binds parties that would otherwise have no contractual or employment relationship with one another.
715. The intention is each party will bear their own costs and will not sue or seek recovery or contribution from other signatories to the agreement. It has the effect of transferring public liabilities into the workers' compensation scheme and remains an area of stakeholder concern, particularly from within the insurance industry.
716. The Discussion Paper proposed that contractual indemnities to third parties (i.e. the sideways indemnity) be prohibited and nullified. Some of the key issues and risks with these types of contractual indemnities include:
- transfer of public liability costs into the scheme;
  - lack of control over safety standards of third parties;
  - risk is unquantifiable;
  - distortion of true cost of claims;
  - increased exposure for contractors;
  - statutory indemnity arrangements under the Act and recovery provisions are undermined.
717. There was no proposal to disturb the long standing practice of indemnities between principals and contractors where the principal is already indemnified under s175(2) and had sought an extension to cover common law damages.

## Stakeholder submissions

718. The majority of stakeholders support this proposal. There is strong support from the ICA for a prohibition on both sideways and vertical indemnities.
719. However, there is strong opposition from a number of stakeholders, including CCI, the Australian Petroleum Production and Exploration Association Limited (APPEA – the peak national body representing Australia’s oil and gas exploration and production industry), Chamber of Minerals and Energy of Western Australia (CME).
720. The opposition to the prohibition rests on the view that indemnity arrangements are best dealt with as part of contract management negotiations and it is not necessary to legislate in this area or to limit workers’ compensation insurance options available in the market.
721. The following points were made by those who oppose the proposal:
- negative impact on the indemnity arrangements adopted in the energy market globally and preparedness of international contractors to operate in Western Australia;
  - limiting the capacity of an organisation to enter into contracts or meet contractual requirements will undermine competitiveness of Western Australia, while delivering no perceived public good or benefit to workers or their families;
  - contractual indemnities represent a contractual allocation of risk most suited to features of the industry’s activities, e.g. use of a large number of specialised contractors routinely working together in pursuit of the principal’s overall operations;
  - would remove the traditional knock-for-knock indemnities common in the global oil and gas industry;
  - costs will increase due to the need to purchase additional public liability insurance;
  - re-opening of negotiation of thousands of contracts adding significantly to transactional costs for principals and contractors;
  - increase in disputes about responsibility for personal injury, active pursuit of recovery actions by insurers and increased legal costs.

## Recommendation

722. WorkCover WA acknowledges this issue extends beyond the workers’ compensation scheme. It may not be appropriate to nullify mutual indemnity contractual arrangements between contracting parties through the workers’ compensation statute at this time given the scope for this review.

723. Any future review of the design of the scheme may wish to consider whether a prohibition is appropriate to prevent small businesses bearing the cost of the negligent conduct of others and to reinforce obligations for safety standards and the duty of care.
724. However, a legislative response is necessary to prevent the transfer of these risks into the workers' compensation scheme. The risk of public liability costs entering the workers' compensation scheme is a significant concern especially if the mutual indemnity arrangements become an accepted commercial practice outside the oil and gas industry.
725. WorkCover WA recommends an alternative to that proposed in the Discussion Paper that would prevent an employer from extending their workers' compensation insurance policy to cover any contractual indemnity covering a third party's liability for common law damages. It would also prevent insurers indemnifying this risk under the employer's workers' compensation policy. The validity of the contractual indemnity would not be affected but these contractual indemnities would need to be insured in the public liability sector.
726. This would prevent public liability risks from entering the scheme and require contractors who enter into these arrangements to secure the necessary insurance from the public liability insurance market.
727. Transitional arrangements will ensure policy endorsements effective before the commencement date will not be affected.

#### **Contractual Indemnities**

**R:125** It is recommended the new statute prohibit workers' compensation policies or endorsements covering contractual indemnities in respect of an insured employer's undertaking to indemnify a third party in respect of the third party's liability to pay damages.

**R:126** It is recommended the prohibition on policy endorsements not apply to a principal extending the statutory indemnity permitted under the current Act to include liability to pay damages to a contractor's workers.

## Self insurance

### Self insurance

728. The Discussion Paper identified the self insurance provisions as generally working well in the scheme. However, some areas of the Act have been identified as requiring revision.
729. The Discussion Paper proposed the introduction of an enhanced regulatory framework:
- empowering WorkCover WA to review, cancel, revoke and impose conditions on self insurer licenses, aligned with the regulatory approach in other privately underwritten jurisdictions;
  - empowering WorkCover WA to monitor and audit self insurers;
  - requiring self insurers to:
    - provide a bank guarantee;
    - hold common law and catastrophic reinsurance cover;
    - provide WorkCover WA with an annual actuarial assessment of outstanding liabilities on prescribed terms;
  - clarifying when and how the securities are to be used and how claims are to be managed if a self insurer defaults (modelled on similar provisions in the *Workers' Compensation Act 1987 - NSW*) including:
    - reinforcing the bank guarantee as a statutory form of security with WorkCover WA as the sole beneficiary;
    - clarifying the bank guarantee provides for all the accrued, continuing, future and contingent liabilities of the self insurer;
    - the security given to WorkCover WA to remain in force until WorkCover WA is satisfied all claims have been discharged with ability to increase or decrease the security;
    - express authority for WorkCover WA to draw on the securities and manage claims (through an agent such as ICWA) where a self insurer is insolvent or unable to meet its liabilities;
    - all necessary powers and functions of the self insurer will be vested in WorkCover WA or its agent in order to manage claims of any default self insurer.

### Stakeholder Submissions

730. There is broad support for the proposed amendments to self insurance arrangements.



731. One stakeholder suggests there be some flexibility in allowing self insurers to obtain other forms of security against their liabilities apart from a bank guarantee, for example a bond. A bank guarantee is the most appropriate security and the amendments will reinforce this as an unconditional charge enforceable by WorkCover WA. Bank guarantees are the preferred form of security in other workers' compensation jurisdictions. However, in the event circumstances change the new statute will provide flexibility for other forms of security to be authorised by WorkCover WA at WorkCover WA's discretion.

### Recommendation

#### Self insurance approvals

**R:127** It is recommended the new statute empower WorkCover WA to approve self insurers and to review, cancel or revoke approvals.

#### Conditions on self insurance

**R:128** It is recommended the new statute empower WorkCover WA to attach conditions to a self insurance approval at any time during the approval period.

#### Requirements for self insurance

**R:129** It is recommended the new statute require each self insurer to:

- i) provide a bank guarantee against their liabilities, or other approved security if approved by WorkCover WA;
- ii) hold common law and catastrophic reinsurance cover (in addition to the bank guarantee) on prescribed terms;
- iii) provide WorkCover WA with an annual actuarial assessment of outstanding liabilities on prescribed terms.

#### Self insurer performance

**R:130** It is recommended the new statute provide WorkCover WA with express authority to:

- i) monitor or audit the performance of a self insurer;
- ii) require a self insurer to provide WorkCover WA with relevant information on request.





### Use of securities

**R:131** It is recommended the new statute provide WorkCover WA with express authority to:

- i) draw on securities given by a self insurer where the self insurer cannot meet the cost of payments due under the statute;
- ii) manage claims of a default self insurer and exercise its powers through an agent.

## Licensed insurers

### Licensing and performance monitoring of insurers

732. Section 161 of the Act provides for the approval and oversight of workers' compensation insurers by the Minister and WorkCover WA. There is scope to amend the current provisions to provide additional flexibility and clarity without significant change to the intent. The issues are noted as follows:
- inconsistent terminology e.g. in s161(3) the Minister is variously required to assess or consider an insurer's status as 'sufficient' or 'satisfactory';
  - WorkCover WA's role in providing advice to the Minister;
  - out of date provision (s161(6)) concerning transitional arrangements;
  - uncertainty over definition of 'incorporated insurance office' (s161(1)).
733. In addition to technical drafting issues, the Discussion Paper proposed:
- WorkCover WA be vested with the power to approve, revoke and suspend an insurer's licence;
  - insurers are 'licensed' rather than 'approved' to reflect the current regulatory regime;
  - the codification of WorkCover WA's role to monitor insurers' compliance with licence criteria and conditions;
  - a power to attach conditions to a licence as part of the performance monitoring framework.
734. These proposals are consistent with the approach in other privately underwritten jurisdictions and will facilitate streamlining the controls and process around approval/licensing.

### Stakeholder Submissions

735. There are no objections to the proposals relating to the licensing and performance monitoring framework for licensed insurers.
736. ICWA does not support the proposal if it is required to apply for a licence. WorkCover WA has clarified the intention to 'deem' ICWA a licensed insurer on similar terms to its current arrangements.
737. While generally supportive of the proposals the ICA's view is the power to impose conditions should be limited to the issuing and renewal of licenses only without any capacity for retrospectivity in relation to any endorsements issued.

## Recommendation

738. The capacity to apply conditions relates to the performance of insurers against license criteria and standards, and general compliance with the Act. There is no intention to apply conditions in relation to policy endorsements which are regulated by other means. In terms of exercising the power to apply conditions WorkCover WA does not agree this should be limited to the issuing and renewal stages of the license. It is an essential function in the ongoing performance monitoring framework, as it is for other service providers in the workers' compensation scheme.

### Licensing of insurers

**R:132** It is recommended the new statute introduce the term 'licensed insurer' to replace the term 'approved insurer'.

**R:133** It is recommended the new statute empower WorkCover WA to license insurers.

### Conditions on licensed insurers

**R:134** It is recommended the new statute empower WorkCover WA to impose conditions on licensed insurers.

### Insurer performance monitoring

**R:135** It is recommended the new statute provide WorkCover WA with express authority to monitor whether an insurer complies with licence approval criteria and conditions.

## References to insurer

739. Many sections throughout the Act contemplate action by either the employer or the insurer. However, the way in which this is referenced is not consistent. For example, many sections and subsections include within the text "the employer or the employer's insurer." In others, a separate subsection is included to specifically provide the link. For example, s64(3) provides:

*A reference in subsection (1) to the employer is, where the employer is insured against liability to pay compensation under this Act, a reference to the employer's insurer.*

740. While there are legal principles which enable an insurer to carry out these obligations on the employer's behalf, the Discussion Paper proposed this be clear in the new statute. It is not intended to transfer employer obligations to the insurer, or that the insurer should share the obligations. However, it is intended to recognise in many situations, the insurer may carry out an obligation on an employer's behalf.

## Stakeholder Submissions

741. All stakeholders support this proposal. One stakeholder suggests where duties or obligations are transferred to the insurer under the insurance policy it is reasonable that the insurer be held accountable for the performance of those duties and functions.

## Recommendation

742. One of the drafting challenges will be to ensure the new statute does not encroach on subrogation or contractual matters between employers and insurers. The recommendations in relation to prescribing all key terms and conditions of insurance policies should complement this recommendation about the respective duties of employers and insurers.

### **Insurer to act on behalf of employer**

**R:136** It is recommended the new statute clearly identify the provisions where a reference to an employer includes a reference to an insurer.

## Request for insurance

743. An approved insurer is required to insure any employer requesting it for the full amount of the employer's liabilities under the Act. This is an important requirement which ensures all employers can secure mandatory insurance under the Act. It also maximises competition between approved insurers.

744. This provision does not directly address a failure by an insurer to quote a premium when requested by an employer. Employers with a current policy of insurance may wish to source the market either in the lead up to renewal of the policy or to change insurers during the policy period for various reasons.

745. The Discussion Paper proposed the new statute support this by making it an obligation on insurers to offer quotes without qualification.

## Stakeholder Submissions

746. The ICA does not support an obligation to quote without qualification on the basis an insurer must have the right to request further information from an employer before binding itself to the premium likely to be charged. It is argued that insurers often have to make inquiries as to the employer's business and associated risks and needs to qualify any quote in case further information supplied by the employer or its broker substantially changes the risk profile and therefore the required premium. It is also suggested that reinsurance approval is sometimes required for particular types of risks (e.g. underground exposures).

747. The ICA's view is that an employer should not seek quotes within a valid policy period and the obligation to quote should only apply if the business has never had insurance, the business is newly acquired or prior to its renewal date.
748. The requirements to quote without qualification was also raised as an issue for small niche insurers, such as Guild Insurance or Catholic Church Insurance, which may not have the capacity to insure employers outside their market profile.

### Recommendation

749. It is acknowledged there is a need for quotes to be qualified, hence the term 'likely to be charged'. This should enable a conditional quote to be given subject to the necessary inquiries being completed by insurers.
750. WorkCover WA does not agree with the insurance industry view of discouraging employers from seeking quotes within a policy period. This blunts market competition, limits an employer's ability to secure the necessary insurance and will exacerbate the problems identified above for the insurer in providing quotes before the policy expires.
751. The provision will be drafted so an insurer is only obligated to provide one quote to an employer for the relevant policy period (in the event of multiple requests from a single employer) for a conventional policy of insurance.
752. It is recommended the issue regarding niche insurers be accommodated in the new statute through the licensing process which will preserve the specialised insurance arrangements of Guild Insurance Ltd and Catholic Church Insurances Ltd. However, the new statute will not otherwise change the current obligation on insurers to insure any employer requesting it.

#### **Request for insurance – obligation to quote**

**R:137** It is recommended the new statute oblige insurers to provide a quote on the premium likely to be charged, if requested by an employer.

#### **Specialised insurers**

**R:138** It is recommended the new statute empower WorkCover WA to apply conditions on insurer licences, such that the insurer is only required to insure employers of a specified class.

## Scope of insurer's duty to insure and indemnify employers

753. An insurer is obliged to insure an employer for the full amount of the employer's liability to pay compensation and damages to workers. However, the insurance policy may not respond if the work related injury arises out of employment not specified in the employer's request for insurance. An insurer is not obliged to provide cover that is not requested (*Wesfarmers Insurance Ltd v Cotter and Velint Pty Ltd* (1990) 1 WAR 493).
754. An employer employing workers to undertake work outside the scope of the business requested and mentioned in the insurance policy would not necessarily be indemnified in the event of a claim despite having a liability under the Act. This leaves a potential insurance gap.
755. The liability required to be indemnified should be for any claim made by the employer's 'workers' and not limited to employment arrangements relating to the description of the business which the employer conducts when effecting a policy of insurance.
756. The remedy for an insurer whose rights are prejudiced due to an employer's failure to disclose accurately the nature of their business should be by way of premium adjustment, not denial of liability.
757. The Discussion Paper proposed the new statute clarify the insurance indemnity cover all 'workers' employed or engaged by the employer and that any omission in the request for insurance regarding the description of the employer's business classification cannot be used to refuse to indemnify the employer.

### Stakeholder Submissions

758. This proposal is supported by most stakeholders. The ICA indicates qualified support but suggests the following remedies be available where an insurer's rights are prejudiced due to the employer's failure to disclose accurately the nature of their business:
- an appeal process with WorkCover WA where the omission is classified as 'material';
  - the premium adjustment not being prejudiced by timing factors related to a 75% loading application to the WorkCover WA Board. This would occur if the premium that should have been payable is assessed at over 75% of the recommended rate.

## Recommendation

759. The ICA's suggestion for an appeal process is not necessary as the recovered premium can be pursued as a contractual matter between the parties. Where the premium adjustment results in an amount that exceeds 75% of the recommended premium rate it is still prudent for the matter to be considered by WorkCover WA.

### **Approved insurer – requirement to provide insurance**

**R:139** It is recommended an insurance indemnity cover all 'workers' employed or engaged by the employer irrespective of any omission by the employer when effecting or renewing a policy of insurance.

## Insurance policies

### Burning cost policies

760. A burning cost policy (or adjustable premium policy) is one in which the premium closely reflects the policy holder's claims experience over a period of several years. The period is usually 3-5 years depending on the insurer.
761. Under the burning cost method, employers are required to pay an initial deposit premium when the policy period commences. This premium is periodically adjusted up to an agreed finalisation date. At each adjustment the employer may receive a refund or be required to make an extra premium payment depending on the employer's claims experience.
762. The method acts as an incentive for (typically large) employers to be more directly involved in injury prevention and management as their performance directly impacts on the premium cost.
763. Some burning cost policies may have a 'minimum' and 'maximum' premium which reflects, respectively, an optimistic and pessimistic assessment of likely costs. In such cases employers carry the risk of difference between these thresholds. Terms and conditions may be subject to negotiation with insurers.
764. The Discussion Paper identified while burning cost policies are widely used in the scheme, the Act does not specifically provide for them.
765. Accordingly the Discussion Paper proposed the new statute introduce a framework to recognise burning cost policies in the scheme as an optional method for paying premium. To address any potential scheme risks associated with these policies a regulation making power was also proposed which may include specific regulatory controls, if required.

### Stakeholder Submissions

766. Statutory recognition of burning cost policies is supported in stakeholder submissions.
767. However, the ICA does not support any alternation to the provisions of burning cost policies that may limit competition. The ICA's view is that burning cost policies provide the market with an innovative way of pricing risk while encouraging employer ownership of safety and injury management. The ICA therefore does not support any regulation of the terms and conditions as the structure and design of burning cost policies may vary significantly and any attempt to prescribe conditions may limit insurer competition.



768. NIBA, QBE and LGIS WorkCare (Western Australia) (LGIS) have similar concerns regarding the potential constraints on insurers.
769. CCI supports the proposal on the proviso it does not inhibit flexibility or impose restraints on policy arrangements. The CCI opposes the specific proposal to remove the appeal mechanism for employers participating in a burning cost policy arrangement.
770. One stakeholder, while supporting the proposal in principle, suggested some regulatory controls including:
- minimum premiums not exceeding maximum premium loading;
  - available only in conjunction with a pricing option for a conventional policy;
  - a capping to be applied to final insurance margins and a maximum run off period at 3 years after expiry.

### **Recommendation**

771. There is clearly a need for statutory recognition of burning cost policies as an alternative and optional premium methodology. WorkCover WA acknowledges the benefits of burning cost policies and seeks to ensure greater transparency in these arrangements rather than impede competition. While there is no intention of imposing regulatory controls it is prudent that such a capacity exists if there is ever a threat to scheme viability.
772. The Act currently provides for a similar capacity with respect to setting maximum permissible loadings or maximum permissible discounts which may be charged in respect of a recommended premium rate. This power is not exercised but remains a potential control on any market failure. Similar regulatory capacity is required for any other alternative premium methodology.
773. As an optional arrangement for employers the appeal mechanism is not required or appropriate. An employer will always have the right to appeal a premium assessed by an insurer based on a recommended premium rate set by WorkCover WA, and it would be expected that insurers provide a pricing option for a conventional policy for comparison purposes before an employer agrees to a burning cost policy.

### Burning cost policies

- R:140** It is recommended the new statute recognise burning cost policies (i.e. policies with an extended period and alternative methods for calculating premium).
- R:141** It is recommended the new statute clarify burning cost policies are optional and must not be used by insurers as a compulsory form of policy - their use and the amount of premium payable must be negotiated between the employer and insurer.
- R:142** It is recommended the premium appeal mechanism not apply to burning cost policies.
- R:143** It is recommended the standard employer indemnity terms and conditions apply to burning cost policies.
- R:144** It is recommended the new statute provide for regulations to set out any limits, controls, terms or conditions applicable to burning cost policies, if required.
- R:145** It is recommended the requirement to provide an annual statement of remuneration will apply to all employers including those who negotiate burning cost policies.

### Lapsed policies

774. The Act imposes a statutory liability which prolongs an approved insurer's obligation to indemnify an employer for a 7 day period from the time WorkCover WA receives a statement from an approved insurer that a policy has lapsed.
775. The Act requires each insurer to provide WorkCover WA with a statement within 14 days of the end of the month containing details of each employer in respect of whom the insurer has marked in its books as lapsed.
776. The long standing requirement to hold an insurer on risk for a short period following notification to WorkCover WA of a lapsed policy is appropriate. The notification enables WorkCover WA to effectively undertake compliance activities to ensure employers, at all times, hold appropriate policies of insurance. The requirement also acts an incentive for insurers to manage policy renewals in a timely manner.
777. However, there are improvements that can be made. The word 'lapsed' is not defined and there is some ambiguity around the event which triggers the notification (date the policy expires versus the date of the notification to WorkCover WA). A statutory definition and simplified reporting would provide certainty to insurers and WorkCover WA as to the period on risk and reporting obligations.

778. The Discussion Paper proposed the new statute define a policy as being 'lapsed' after:
- the period of cover specified in the policy of insurance; or
  - the days of grace specified in the policy of insurance.
779. It was also proposed the new statute clarify that insurers remain on risk for 7 days after a lapsed policy notice is received by WorkCover WA notwithstanding the effective date of the lapsed policy.

### Stakeholder Submissions

780. These proposals are supported by stakeholders. The ICA proposes in the event an employer finds alternative cover the policy should lapse from the earlier date (when alternative cover is secured). To address any double insurance, QBE suggests the 7 day obligation to remain on risk not apply 'if advised by an employer or representative that insurance cover has been arranged elsewhere'.
781. The ICA also proposes insurers be given adequate lead time to comply.

### Recommendation

782. The ICA proposal for the date of the lapsed policy to be backdated to the date an employer finds alternative cover relies on the accuracy of the information given to the insurer. It does not include any period for WorkCover WA compliance activities to verify the insurance status of the employer.
783. It is recommended the 7 day period an insurer remains on risk should commence from the date the insurer notifies WorkCover WA as proposed in the Discussion Paper. This would only occur after the period of cover specified in the policy of insurance has expired and allows for the necessary compliance activities to be undertaken by WorkCover WA. This does not result in double insurance as insurers are only required to indemnify an employer following a lapsed policy if the employer is not insured.

### Lapsing of policies

- R:146** It is recommended the new statute define when a policy has lapsed.
- R:147** It is recommended the new statute clarify an insurer is on risk and must indemnify an employer for up to 7 days from the time WorkCover WA receives a lapsed policy notice by the insurer.
- R:148** It is recommended WorkCover WA approve the form and manner in which the lapsed policy notice is to be given.
- R:149** It is recommended the new statute make clear a policy of insurance is not cancelled by virtue of having lapsed.

### Cancellation of policies

784. WorkCover WA is empowered to determine whether an insurer should be permitted to cancel a policy of insurance. WorkCover WA can place terms upon the cancellation of a policy of insurance notwithstanding the actual terms of the policy.
785. As cancellation refers to the withdrawal of cover (effectively the early termination of the policy), cancellation is typically confined to situations where the employer has sold or wound up the business, is no longer employing or is insured elsewhere.
786. The requirement for approval by WorkCover WA enables inquiries of the employer as to whether there are any outstanding or potential future liabilities under the Act and/or whether or not replacement insurance has been arranged before the cancellation is sanctioned.
787. Cancellation is unlikely to be approved where there are any potential or unfinalised claims or where the process is being used as a mechanism to repudiate the policy for non compliance by an employer with a condition precedent.
788. Non payment of premium has been raised as an issue potentially warranting cancellation of a policy of insurance. Payment of premium and the method of payment is not a condition precedent to the establishment of liability in the insurer to indemnify the employer (under standard policy wording) and does not entitle the insurer to repudiate the policy.
789. The Discussion Paper proposed WorkCover WA is authorised to permit an insurer to cancel a policy of insurance for non payment of premium where reasonable notice has been provided by the insurer about the amount due and that amount has remained unpaid for a prescribed period.

## Stakeholder Submissions

790. This proposal is supported by stakeholders although the ICA only supports it if the prescribed period aligns with credit terms agreed by insurers. The agreed terms align with general insurance contracts which may specify cash up front, or 120 days for policies involving a broker (90 days plus 30 days grace period).
791. The ICA also submits WorkCover WA collect and analyse data on policies cancelled for non payment of premium and identify companies that have a history of non payment and consider appropriate action. QBE also make similar suggestions with the addition that a cancelled policy be reinstated if full payment is made within 30 days after a cancellation notice.

## Recommendation

792. The period the premium remains unpaid before WorkCover WA can authorise an insurer to cancel a policy will be set out in regulations. The period will be linked to standard business terms. As part of the development of regulations insurers will be consulted on the appropriateness of terms of payment specified in insurance contracts.

### Cancellation of policies

**R:150** It is recommended the new statute enable WorkCover WA to permit an insurer to cancel a policy of insurance for non payment of premium where:

- i) the insurer has given reasonable notice to the employer about the amount due;
- ii) the premium has remained unpaid for a prescribed period.

## Regulation of insurance policies

793. The policy of insurance indemnifies the insured against loss or liability caused by an identified category of event or events. However, the extent of the indemnity will be determined by the description of the insured risks, and any specified indemnity limits, and applicable exclusions. The conduct of the insured also impacts on whether an insurer indemnifies under the policy of insurance.
794. Historically, the insured risks, indemnity limits, exclusions and conditions have formed part of the policy of insurance although the Act has always imposed on these arrangements in certain respects (e.g. the amount of insurance required is the full amount of the employer's liability for statutory compensation).

795. Concerns regarding the consistency between standard employer indemnity policy provisions and the Act were addressed, in part, via legislative amendments enacted in 2011. Those amendments permitted regulations, rather than a commercial contractual arrangement, to set out prescribed policy conditions.
796. The 2011 amendments provided legislative authority for important limits and exclusions which had previously been matters of contract in standard employer indemnity policies. It was considered appropriate the Act and regulations, rather than contractual conditions, govern these insurance liabilities.
797. However, there are a number of important terms and conditions of insurance policies which should be authorised by statute. These include clauses relating to:
- ‘misrepresentation’;
  - ‘notice of injury’;
  - ‘litigation, settlement or admission of liability’;
  - ‘premium calculation’;
  - ‘reasonable precautions’;
  - ‘waiver’;
  - ‘cancellation’.
798. The Discussion Paper proposed:
- all terms and conditions of standard employer indemnity policies be reviewed and prescribed by regulations including the form of the policy;
  - the new statute enable WorkCover WA to approve, limit or modify policy endorsements or extensions by regulation.

### Stakeholder Submissions

799. Stakeholders support the proposal for all terms and conditions of standard employer indemnity policies to be reviewed and prescribed in regulations. NIBA indicates any changes in terms or conditions should be agreed well in advance of implementation to ensure market awareness and all necessary steps are taken to arrange compliance with the changes.
800. The ICA also supports the proposal to regulate standard policy wording but does not support regulations extending to additional policy endorsements or extensions. This opposition is based on a concern it will limit an insurer’s ability to respond to customer needs and stifle market competition.

## Recommendation

801. Any initiative to standardise policy terms and conditions will be undertaken in consultation with the insurance industry, as occurred in 2007 and 2011. WorkCover WA acknowledges a lead time is necessary to implement changes in standard policy terms and conditions.
802. The proposal to approve, limit or modify policy endorsements or extensions by regulations is to ensure there is capacity to respond where endorsements are offered that are either inconsistent with the Act or have the potential to transfer unrelated liabilities or insurance risks into the workers' compensation scheme. Policy endorsements which extend cover to a third party for its liability to pay personal injury damages is one example where regulations are necessary and will be addressed in the new statute.
803. There is also a need to bring transparency to the status of policy endorsements to ensure they form part of the insurance policy and within the scope of the Act.
804. For the reasons above the proposal outlined in the Discussion Paper is recommended without change.

### Regulation of policy of insurance

**R:151** It is recommended all terms and conditions of standard employer indemnity policies be reviewed and prescribed by regulations including the form of the policy.

**R:152** It is recommended the new statute enable WorkCover WA to approve, limit or modify policy endorsements or extensions by regulation.



## Insurance Commission of Western Australia

805. The insurance status of public authorities in relation to workers' compensation is not specified in the Act but in s44 of the *Insurance Commission of Western Australia Act 1986* (the ICWA Act):

*For the purposes of any enactment other than sections 165, 166 and 168 of the Workers' Compensation and Injury Management Act 1981 (the WC&IM Act), public authorities for which insurance arrangements are managed and administered by the Commission under section 6(c) of this Act, are to be regarded as a group of employers that have been exempted by the Governor under section 164 of the WC&IM Act from the obligation to insure pursuant to the WC&IM Act except for the obligation to insure against liability to pay compensation for any industrial disease of the kinds referred to in section 151(a)(iii) of the WC&IM Act.*

806. The ICWA Act regards public authorities as a self insured group in order to exempt them from the insurance requirements under the Act. Under the ICWA Act, ICWA has a general power to manage and administer insurance and risk management arrangements on behalf of public authorities. A self insurance fund is established via ICWA's RiskCover division for this purpose.
807. However, the status of ICWA is not clear. ICWA is not an 'approved insurer' under the Act (other than for issuing industrial disease policies in the mining sector) and is not a self insurer in its own right. In practice ICWA through its RiskCover Division and Fund operates more akin to a conventional insurer in relation to claims management for public authorities but its role and decision making function are not specified in the claims procedure in the Act.
808. Despite the deemed status of public authorities as a self insured group, in practice (and law) they are employers in their own right in relation to liability for claims and injury management.
809. In order to clarify these issues the Discussion Paper proposed the new statute will deem:
- ICWA to be a licensed (approved) insurer;
  - public authorities to be employers (based on s3 of the ICWA Act).



## Stakeholder Submissions

810. ICWA supports legislative amendments which deem it an insurer under the Act but had some reservations about the repeal of s44 of the ICWA Act on the basis its role in managing the self insurance arrangements of public authorities is clear. ICWA also proposed it be exempt from:
- the effect of current s155D(3) which enables employers to discharge their return to work obligations to their insurer, on the basis public authorities should endeavour to coordinate injury management activities;
  - the requirement to contribute to the Employers' Indemnity Supplementation Fund (levy for collapse of an insurer) on the basis it is currently exempt and will never make a claim as it is underwritten by the State.
811. ICWA also proposed that in being deemed an approved insurer it should not be required to apply for a license to carry out its statutory functions under the ICWA Act and should continue to administer a government fund and premium (fund contribution) methodology relevant to public authorities. ICWA is keen to work closely on a model where departures from the licensed insurer model need to be preserved.
812. Other stakeholders support the proposal.

## Recommendation

813. WorkCover WA has met with ICWA to clarify the legislative gaps and the intention to preserve in substance the current insurance arrangements that exist in practice.
814. ICWA will be required to comply with other obligations of insurers consistent with longstanding practice including claim management timeframes. It is acknowledged there will be some departures from requirements imposed on private insurers related to ICWA's unique status which can be addressed in the administration of the licensing regime. ICWA will not be required to apply for a license or meet the same prudential requirements applicable to private insurers.
815. As proposed in the Discussion Paper ICWA will continue to administer a government fund and premium methodology relevant to public authorities. The insurance and premium arrangements in place for public authorities and managed by ICWA will be preserved even though public authorities will not be classified as a self insured group.
816. WorkCover WA agrees with the continuation of ICWA's exemption from contributing to the levy arrangements for insolvent insurers. The proposed exemption from the effect of s155D(3) is also supported as that provision was intended to assist very small employers which may not have capacity to directly manage return to work obligations.

**Insurance Commission and public authorities**

**R:153** It is recommended s44 of the *Insurance Commission of Western Australia Act 1986*, in relation to the self insurance status of public authorities, be repealed.

**R:154** It is recommended the new statute:

- i) deem ICWA a licensed insurer in respect of workers' compensation obligations of public authorities;
- ii) deem public authorities as individual employers.

**R:155** It is recommended the new statute preserve ICWA's government fund and premium methodology relevant to workers' compensation insurance arrangements for public authorities.

## Insurance arrangements for specified industrial diseases

817. The Act provides for the establishment of a separate regime for insuring against industrial diseases in the mining industry and the process of fixing a premium to cover related claims.
818. The insurance arrangements are limited to workers' compensation liabilities for the asbestos related respiratory diseases of pneumoconiosis, lung cancer, mesothelioma, and diffuse pleural fibrosis.
819. This insurance is provided through the Compensation (Industrial Diseases) Fund (CIDF) which is administered by ICWA. ICWA is the sole insurer of the specified industrial diseases.
820. All mining employers pay a premium (currently \$100) into the CIDF per three year policy period.
821. The Minister is empowered to specify other industrial diseases and for WorkCover WA to specify classes of employer required to pay the premium – however, no other diseases or classes of employer have been gazetted.
822. The Discussion Paper highlighted that a separate regime for insurance arrangements in the mining sector is no longer a statutory necessity and proposed current and future liabilities are integrated into conventional workers' compensation arrangements. Private insurers offer insurance for common law liabilities of mining employers and currently underwrite asbestos liabilities of employers outside the mining sector.

### Stakeholder Submissions

823. The ICA and QBE do not support this proposal due to a concern it may have a negative impact on insurer performance and premium rates. The ICA's view is that asbestosis and other industrial diseases are excluded from treaty reinsurance arrangements and it may prove difficult or expensive to obtain treaty protection from AAA rated reinsurers.
824. The CME has concerns with the potential for increased costs through higher workers' compensation premiums. The CME supports the preservation of the CIDF and utilising any surplus for research purposes into preventative strategies that reduce the exposure of those working in the mining industry in Western Australia to industrial diseases.

## Recommendation

825. There is no evidence to support the view that reinsurance protection is unavailable for asbestosis. Insurers are already required to indemnify against asbestos related conditions for employers outside the mining sector and offer policy endorsements to cover the common law risk of mining employers for asbestos actions (the CIDF only responds to statutory liabilities for pneumoconiosis, lung cancer, mesothelioma, and diffuse pleural fibrosis).
826. The number of outstanding CIDF claims at the end of 2012 was 28 and the CIDF has been in surplus for many years. Mining employers currently pay a \$100 premium for a three year policy which has also remained stable for many years. The premium impact is likely to be negligible and will be actuarially assessed as the review progresses.
827. There is no reason why private insurers cannot absorb the asbestos claims of mining employers into conventional insurance arrangements.
828. The financial position of the CIDF and the use of any surplus funds are transitional matters for discussion outside the legislative review process.

### Mining employers – insurance obligations

- R:156** It is recommended the existing insurance regime for workers' compensation liabilities of mining employers be discontinued.
- R:157** It is recommended mining employers be required to insure asbestos liabilities with approved workers' compensation insurers under standard insurance policies.
- R:158** It is recommended the new statute require approved insurers to indemnify mining employers for asbestos diseases from a proclaimed date.

## Acts of Terrorism

829. Following the terrorist attacks of 11 September 2001 in the United States of America, the major reinsurers (which back insurance companies against large losses) withdrew coverage for acts of terrorism. Without reinsurance, insurers were no longer able to provide insurance policies for terrorism risks. This action, while justified from an actuarial and economic perspective, constituted a technical breach of the *Workers' Compensation and Injury Management Act 1981* which requires the insurer to insure an employer requesting it for the full extent of their liability under the Act. The *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001* (the Terrorism Act) was introduced to address this situation.
830. The Terrorism Act permits insurers to exclude liability for acts of terrorism from workers' compensation policies and establishes a specific, post-terrorist event workers' compensation insurance arrangement, collectively funded by contributions from Western Australia's approved insurers and self-insurers.
831. The legislation as introduced in 2001 was intended to be an interim measure, as it was anticipated that the Commonwealth Government would introduce legislation to provide a national fund to cover acts of terrorism. As such, it contained a 'final day', or sunset clause.
832. The Commonwealth Government has since developed a national scheme; however it excludes workers' compensation liabilities, which are to remain the responsibility of the States and Territories. As the need for the Terrorism Act remains, several subsequent extensions to the 'final day' in the Terrorism Act have been granted via the Final Day Regulations, the most recent to 31 December 2018.
833. Western Australia's Terrorism Act provides for:
- approved insurers and self-insurers to be excluded from their liability under s160 of the Act to insure employers for workers' compensation against a terrorist event providing they contribute collectively to terrorism claims and hold a valid contribution agreement with WorkCover WA;
  - a \$25 million collective liability cap for insurers and self-insurers with a reduction factor to apply for liability exceeding this cap;
  - a 90 day time limit for claims applicable from the date specified in a Ministerial declaration. If no Ministerial declaration is made, injured workers may still be compensated providing that WorkCover WA is satisfied an act of terrorism has occurred – no time limit applies in this situation;
  - ICWA to manage claims with liabilities to initially be paid from the Employers' Indemnity Supplementation Fund and recovered from insurers and self-insurers in due course;

- once liability is determined, insurers are collectively liable for 95% (apportioned by market share). Self-insurers are liable for the remaining 5% (apportioned by level of declared wages).

### Acts of Terrorism Review

834. WorkCover WA undertook a review of the acts of terrorism legislation in the latter half of 2012 with the release of a discussion document in September 2012. The first round of stakeholder consultation took place in October-November 2012 with a further round occurring in February-March 2013.
835. WorkCover WA engaged with the following key stakeholders: scheme insurers, the ICA, the WA Self-Insurers Association, ICWA, CCI, UnionsWA, the Law Society, NIBA, the scheme actuary and the Department of the Premier and Cabinet.
836. A final report for the acts of terrorism review was approved by the WorkCover WA Board in June 2013 and submitted to the Minister for Commerce for inclusion in the broader review of the principal Act. The acts of terrorism review recommended the following:
- the sunset clause in the Terrorism Act be repealed. Relevant provisions will be moved to the *Workers' Compensation and Injury Management Act 1981*;
  - a statutory definition of 'act of terrorism' based on the Commonwealth's Criminal Code Act 1995 to be included (recommended by Department of Premier and Cabinet to align with the recent convention regarding statutory definitions of this kind);
  - contribution agreements between WorkCover WA and insurers/self-insurers to be abolished. Insurer/self-insurer participation in the scheme will be automatic and compulsory with relevant provisions from agreements carried over to regulations;
  - Ministerial declaration will be the sole trigger to activate acts of terrorism arrangements;
  - collective liability cap for insurers and self-insurers to be increased from \$25 million to \$100 million per terrorist event;
  - to account for changing market dynamics, the apportionment of liability for insurer and self-insurers will be calculated at the time of the event with annual reassessments to occur annually thereafter;
  - the 90 day time limit for making a claim will be extended to 12 months (in line with standard workers' compensation claims);
  - the present exclusion regarding common law liabilities will be preserved;
  - the inclusion of a clause providing for triennial review of the acts of terrorism legislation.

## Recommendation

837. It is recommended the acts of terrorism review recommendations are progressed as part of the broader review of the Act.
838. As the terrorism legislation will be integrated in the principal Act it is recommended the general review clause for the principal Act apply and there not be a separate triennial review of the terrorism legislation as initially proposed.

### Acts of terrorism

- R:159** It is recommended the *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001* is repealed.
- R:160** It is recommended relevant provisions of the *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001* are integrated in the new statute with the following amendments:
- i) the sunset clause is repealed
  - ii) the statutory definition of 'act of terrorism' be based on the Commonwealth's *Criminal Code Act 1995*, modified to ensure application to personal injury;
  - iii) Ministerial declaration is the sole trigger to activate acts of terrorism arrangements;
  - iv) contribution agreements between WorkCover WA and insurers/self-insurers be abolished. Insurer/self-insurer participation in the scheme will be automatic and compulsory with relevant provisions from agreements carried over to regulations;
  - v) to account for changing market dynamics, the apportionment of liability for insurer and self-insurers will be calculated at the time of the event with annual reassessments to occur annually thereafter;
  - vi) the collective liability cap for insurers and self insurers be increased from \$25 million to \$100 million per terrorist event;
  - vii) the 90 day time limit for making a claim will be extended to 12 months, in line with any other claim for compensation;
  - viii) the present exclusion regarding common law liabilities relating to terrorism claims be maintained.



## Premium rates

839. Only minor changes are proposed in relation to WorkCover WA's obligation to issue recommended premium rates currently set out in Part VIII of the Act. The provisions related to premium rates will be relocated to the premium rates division within the Liability and insurance Part of the Act, with minor changes to:
- establish an express requirement for WorkCover WA to issue recommended premium rates annually;
  - specifically refer to industry as the basis for recommended premium rates;
  - remove references to rates for industrial diseases in the mining industry;
  - repeal ss154AB and 154AC related to transitional aspects associated with the introduction of the *Workers' Compensation Reform Act 2004*;
  - remove existing barrier to the delegation of assessment of 75% loading applications.
840. The *Employers' Indemnity Policies (Premium Rates) Act 1990* provides for the determination of recommended premium rates for employer indemnity policies (inclusive of common law liabilities). It was enacted at a time when common law insurance was an optional component in workers' compensation policies and authorised WorkCover WA to set premium rates inclusive of common law liabilities.
841. As a result of the 2011 amendments which made common law insurance mandatory under the Act the *Employers' Indemnity Policies (Premium Rates) Act 1990* is redundant and can be repealed.

### **Repeal of *Employers' Indemnity Policies (Premium Rates) Act 1990***

**R:161** It is recommended the *Employers' Indemnity Policies (Premium Rates) Act 1990* be repealed.



## Discussion Paper proposals not recommended in Final Report

### Safety net governance and funding

842. The workers' compensation scheme in Western Australia provides for a 'safety net' to meet various scheme and system risks.
843. The 'safety net' (entitlement protection) is a collective term to describe the arrangements which apply 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;
844. The safety net elements of the scheme have evolved over time and are collectively provided for in four separate Acts which contain distinct and overlapping governance arrangements and funding sources.
845. The funds generally combine risk and operational elements making it difficult to project future cost and/ or liabilities.
846. In a parallel process to the review for the principal Act, 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.
847. The safety net governance and funding discussion paper proposed the various safety net elements be consolidated in a single fund, called the WorkCover WA Safety Net Fund. The proposed model would encompass:
- liabilities for claims relating to uninsured employers currently funded via the WorkCover WA General Account;
  - liabilities of insolvent insurers currently funded via the Employers' Indemnity Supplementation Fund (EISF);
  - initial liabilities relating to acts of terrorism currently provided for under the EISF and subsequently recovered from insurers and self insurers via contribution agreements;
  - liabilities of the scheme established under the *Waterfront Workers' (Compensation for Asbestos Related Diseases) Act 1986*;
  - liabilities of self insurers above the amount provided for in the bank guarantee.



848. The WorkCover WA Board agreed not to proceed with amendments to consolidate safety net governance and funding arrangements at this time.

## Additional Issues raised by stakeholders

### Discontinuation of 75% loading application process

849. The ICA and QBE submit the requirement for WorkCover WA to approve a 75% loading on an employer's recommended premium rate be abolished (s152) on the basis that premium rates are already regulated within the market through competition and market pressures.
850. WorkCover WA does not support the removal of this obligation which supports the integrity of the premium rating process and protects against unreasonable premium loadings on employers.

### Flexibility for more than one set of premium rates

851. PwC suggests the new statute provide flexibility for more than one set of premium rates to be published.
852. The Act already provides flexibility for WorkCover WA to:
- fix categories of businesses or groups of businesses each with a different insurable risk;
  - specify the types of business or occupation within each category;
  - fix the appropriate recommended premium rate for each category.
853. The new statute will specifically refer to industry as the basis for recommended premium rates but will continue to provide flexibility for more than one set of premium rates to be published, if there is an actuarial basis for doing so.

### Clarification of remuneration

854. NIBA highlights the absence of an accepted industry definition of 'remuneration' for premium assessment purposes.
855. WorkCover WA agrees with the need for clarity in relation to various elements including the status of superannuation, fringe benefits, and non wage payments. The new statute will include the existing regulation making power (s159) to authorise regulations to set out the amounts that are to be treated as 'remuneration' for the purposes of the Act.

## Status of Local Government Insurance Scheme

856. LGIS submits local governments should be covered under the scheme under similar arrangements to ICWA (Insurer of state public authorities) with LGIS exempt from providing a bank guarantee. LGIS argues that Local Government via the WA Local Government Association owns the LGIS scheme and guarantees to underwrite unfunded liabilities.
857. WorkCover WA does not agree the LGIS scheme be covered under similar arrangements to ICWA. ICWA's insurance and funding arrangements for workers' compensation are specified in law and underwritten by the State. Local Governments also have a different status to State public authorities. It is appropriate the existing self insurance arrangements continue for local governments including the requirement for a bank guarantee.

## Premium exemption for apprentice wages

858. The Housing Industry Association Ltd (Western Australia) (HIA) proposes exemptions for the wages of apprentices in premium calculations as an incentive for employers to employ more apprentices, particularly in the building trades. In 2009-10 the Western Australian Government provided workers' compensation rebates to employers of apprentices and trainees at Certificate III and above which has since been discontinued.
859. This issue is outside the scope of this review.



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## Part 6 – Dispute resolution

### General

860. The Dispute resolution Part of the new statute will establish the Conciliation and Arbitration Services and provide a regime for the hearing and determination of disputes.
861. Stakeholder submissions did not reveal any significant issues with the current dispute resolution provisions. Some submissions highlighted concerns around dispute timeframes, which are being addressed through operational measures.

### Proposed Part structure

862. There are no proposals to change the structure of the existing dispute resolution provisions.
863. The high level structure of the Part is:
- General
  - Conciliation
  - Arbitration
  - Rules and practice notes
  - Offences
  - Appeals to District Court

### Key changes

864. The Dispute resolution Part of the Act was substantially amended in 2011. Key performance statistics indicate the new regime is working well and no significant changes are proposed to the processes for resolving disputes under the Act.
865. The only proposed changes to the current Act are:
- minor reordering and restructuring of provisions; and
  - discontinuance of the registered agents regime.

## Registered agents

866. The Act provides a regime where a person who is not a legal practitioner may apply for registration by WorkCover WA as a registered agent. A registered agent may represent a party to a dispute in the Conciliation and Arbitration Services and charge for services provided in accordance with the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2014*.
867. Registered agents were introduced into the legislation in 2004. Under the 1993 workers' compensation scheme (1993-2004) legal representation was almost totally excluded in conciliation and limited in review. During this phase representation by non lawyers increased. The 2004 amendments to the Act reintroduced legal representation into the workers' compensation dispute jurisdiction. It was also recognised some form of regulation of non lawyers appearing on behalf of parties was required and a new regime to regulate agents was introduced.
868. Examination of the current list of 201 registered agents reveals four categories:
- 146 employees of insurers and self insurers;
  - 39 employees of law firms;
  - 11 employees of organisations ( i.e. Unions, ADS etc);
  - 4 independent agents.
869. With the exception of the four independent agents, all registered agents are employees. Agents registered in this capacity are required to be nominated by their employer and can only act as registered agents for the employer who nominated them. They are required to demonstrate their employer holds professional indemnity insurance for them.
870. There are two other prescribed categories of registered agents, persons engaged by a self insurer to provide claims management services to self insurers and their employees. They are limited to acting as registered agents for identified self insurers. At the time of reporting there were not any agents registered under this category.
871. The regulations do not limit the parties for whom independent agents can act. As a result these agents are required to provide with their application for registration:
- a criminal check and details of any relevant convictions;
  - a statement of qualifications and experience demonstrating sufficient knowledge of the jurisdiction to enable the agents to represent a party effectively.
872. WorkCover WA may refuse to register an independent agent if the applicant is not a fit and proper person to be a registered agent.

873. There are currently four agents who are independent. These registered agents operate businesses providing services to injured workers.
874. The Discussion Paper proposed the entire regulatory regime for agents be discontinued with the new statute limiting representation in the Conciliation and Arbitration Services to legal practitioners, while facilitating attendance at conciliation and arbitration by persons who were not legally qualified.

### Stakeholder submissions

875. The proposal to remove the registered agents' regime is supported by QBE, Department of Health (Western Australia), CCI, CGU Insurance (Western Australia), SIAWA and the Law Society.
876. Submissions opposing the proposal were made by current independent registered agents, Rio Tinto Limited (Western Australia), CLP Legal Pty Ltd (Western Australia) and an individual lawyer representing the existing independent Registered Agents.
877. Submissions provided by independent registered agents were accompanied by 26 signed statements from clients and service providers supporting their retention in the scheme.
878. Submissions made by the independent agents highlighted:
- the role of registered agents is consistent with and a fundamental part of achieving the purposes of the Act to provide a dispute resolution process that is “fair, economical, informal and quick”;
  - the benefits of allowing workers a choice of representation and cost options needs to be weighed against the requirement to standards of representation by all third parties including lawyers;
  - independent agents offer workers a low cost, informal, cost efficient, practical alternative to the use of lawyers;
  - there is a high level of community recognition, trust and appreciation for agents;
  - independent agents manage claims and negotiate directly with insurers in circumstances where commercially, the claims cannot be properly dealt with by lawyers;
  - agents are, by virtue of the prescribed ‘Registered agents code of conduct’, obliged to provide advice and are not in contravention of the *Legal Profession Act 2008*.
879. CLP Legal Pty Ltd (Western Australia) submits the complexity of the legislation now requires most injured workers to seek some level of assistance and/or representation, with many workers preferring not to use lawyers.



880. UnionsWA did not make a specific submission on the proposal but raised a concern the removal of agents could increase representation costs for workers.

### Recommendation

881. WorkCover WA recommends:

- the discontinuation of the regulatory regime for registered agents and the consequential amendment of the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2014*.
- independent registered agents be transitioned out of the scheme over a 2 year period from a proclamation date set in the new statute.

882. This recommendation is based on the following considerations:

### Unmet need

883. There is no unmet need in the scheme which necessitates continuing a regime for non-legally qualified agents to represent parties. There is a sufficient availability of law firms operating in the workers' compensation scheme to assist injured workers. Current figures based on conciliation application forms lodged by workers' representatives indicate 94% of applications for conciliation filed on behalf of workers are filed by law firms or sole legal practitioners.

884. The WorkCover WA Advice and Assistance Branch is available to provide procedural advice and assistance to injured workers who may have difficulty in navigating the legislation but do not wish to employ a lawyer.

### Capacity to provide a complete service

885. The four independent agents are unable to provide a complete service to injured workers without contravening the *Legal Profession Act 2008*. WorkCover WA acknowledges the 'Registered agents code of conduct' enables registered agents to provide advice to clients. However, the advice provided by agents is limited to their role as representatives in dispute proceedings in the Conciliation and Arbitration Services. WorkCover WA considers providing advice in relation to common law matters is not authorised by the Act. The inability to provide advice on common law matters means a registered agent cannot provide the entire suite of advice an injured worker may need.

### Regulatory resources and oversight

886. WorkCover WA considers that it is an inappropriate use of resources to maintain a comprehensive regime of registration, including audit, on an ongoing basis for only four individuals.
887. WorkCover WA has concluded that the maintenance of the current regulatory scheme is unnecessary for the majority of (non-independent) registered agents who are subject to the control and oversight of their employer.
888. It is WorkCover WA's view that under the new statute responsibility for the supervision, skills, conduct and behaviour of these employees will rest with the entities employing them.
889. Registered agents who are employees of laws firms, insurers, self insurers and prescribed organisations would continue to be able to appear and represent in the Conciliation and Arbitration Services.

### Impact on independent registered agents

890. It is acknowledged this recommendation will significantly impact the four independent registered agents currently operating in the scheme. It is recommended the independent registered agents be transitioned out of the scheme over a 2 year period from a proclamation date set in the new statute.
891. Removing the regime will not prevent the independently registered agents from being employed by a law firm and acting for clients under supervision of a legal practitioner. There are currently 30 registered agents who operate this way as employees of law firms but who are not legally qualified.
892. WorkCover WA will amend the relevant *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination* to permit recovery by legal practitioners for work done by paralegals they employ. The new statute will provide for persons other than legal practitioners to represent a person in the Conciliation and Arbitration Services. However, unless a person is referred to in the costs determination a fee cannot be charged in respect of their representation of a party in the Conciliation and Arbitration Services.

#### Registered agents

**R:162** It is recommended the regulatory regime for registered agents be discontinued.

**R:163** It is recommended independent registered agents be transitioned out of the scheme over a 2 year period from a date set in the new statute.

## Discussion Paper proposals not recommended in Final Report

### Conciliation filing requirement

893. The Act provides an application for conciliation cannot be accepted by the Director unless the applicant has made reasonable attempts to resolve the dispute by negotiation with the other party.
894. The Discussion Paper proposed removal of the requirement to negotiate prior to filing an application for conciliation.
895. Stakeholders are divided on whether the conferral requirement should remain in the new statute. Those supporting its removal explained a preference that parties should still try to negotiate prior to filing an application. Those opposing its removal explained the conferral requirement provides an opportunity for parties to resolve the dispute before additional costs are incurred once formal proceedings have commenced.
896. Given the general preference of stakeholders that conferral occur in some form prior to commencing conciliation, WorkCover WA considers it appropriate for the requirement to confer to be retained in the new statute.
897. One stakeholder proposed the conferral requirement be strengthened however there is no compelling reason to strengthen the current requirements.
898. This proposal to remove the requirement to confer prior to conciliation is not recommended.

## Part 7 – Common law

### General

899. The Common law Part of the new statute will set out procedural requirements, and constraints on awards, for common law damages for injuries occurring after 14 November 2005. The scheme for injuries occurring prior to 14 November 2005 will be maintained and set out in a separate part or schedule of the new statute.

### Proposed Part structure

900. The recommended high level structure of the Part is:

- General
  - Application of division
  - Choice of law
- Constraints on awards of damages

### Key changes

901. The key changes recommended to the current Act are:

- discontinuance of the termination day;
- introduction of a new process which requires the level of WPI to be assessed by an AMS for the purpose of making a common law election i.e. impairment cannot be agreed between the parties for common law purposes;
- introduction of a new provision limiting the commencement of proceedings until the common law threshold and procedural requirements are met.

## Pursuing damages

### Termination day

902. The Act currently provides access to common law damages for a workplace injury is conditional on an injured worker, before the ‘termination day’, electing to retain the right to seek damages.
903. The termination day is one year after the date an injured worker makes a claim for weekly compensation. The termination day can be extended up to a further year in specific circumstances.
904. The concept of a ‘termination day’ and the various supporting legislative provisions are complex, difficult to interpret, and impose an administrative burden on injured workers, employers, insurers and WorkCover WA.
905. Some of the key issues are:
- ongoing uncertainty about the date from which the termination day commences, whether the notice requirement applies to all claims and the service of the notice. This is a particular issue for employers and insurers who are required to notify workers of the termination day at a particular time;
  - a general view 12 months is still an insufficient timeframe to make an election, particularly given there are more extensions to the termination day than elections, and the majority of extensions to the termination day are due to the worker’s condition not being stable to make an assessment of WPI;
  - the interaction and potential conflicts with the 3 year limitation period for personal injury in the *Limitation Act 2005*. There has been some judicial criticism of the constraints imposed by the termination day;
  - the significant regulatory burden associated with registration of applications to extend the termination day and disputes about the circumstances.
906. The *Limitation Act 2005* reduced the limitation period from 6 to 3 years. Workers’ compensation claims now occur in a legislative environment where there is a shorter period to pursue common law damages. The reduced timeframe provides for a more effective balance between the interests of the parties and challenges the basis for further time constraints on a worker’s ability to seek damages.
907. The Discussion Paper proposed the termination day be abolished, with the *Limitation Act 2005* being relied upon to set a 3 year time limit for commencing an action for damages. Other aspects of the common law regime relating to procedural requirements, step down provisions and monetary limits on damages to be awarded would remain.

## Stakeholder Submissions

908. Stakeholder views regarding the removal of the termination day are mixed, with the majority supporting the removal of the regime.
909. Stakeholders opposed to the abolition of the termination day argue the change could lead to:
- increased uncertainty about estimating potential common law exposure;
  - an increase in the duration of claims;
  - workers remaining on compensation longer as the step down in compensation is aligned to the termination day;
  - the increased period an employer remains on risk impacting scheme costs.

## Recommendation

910. WorkCover WA recommends the removal of the termination day.
911. While the termination day acts as an additional limitation period and may provide some marginal certainty to employers about potential common law exposure the negative impacts of retaining the termination day outweigh the benefits.
912. The cost impact of removing the termination day will need to be assessed. The cost is not likely to be material as the 15% impairment threshold is the key constraint on the awarding of damages which will continue to limit the number of common law claims.
913. Stakeholders opposed to this proposal suggest without the 12 month timeframe for election workers with a WPI of between 15% and 25% would receive compensation longer which will increase costs. The potential cost increase is likely to be small as experience has shown:
- there are very few elections made;
  - one year extensions to the termination day are common (almost double the number of elections);
  - very few workers are being paid compensation at the end of the extended period (after two years).
914. The benefits of this recommendation are:
- resolution of the conflict with the time constraints in the *Limitation Act 2005* and alignment of workplace injury with limitation periods for all other personal injuries;
  - consistency with other jurisdictions which do not impose additional time constraints in workers' compensation legislation affecting the ability of the worker to receive damages;

- removal of the need for an employer to issue a notice to a worker and the associated legal uncertainty about the trigger date for the notice and ongoing disputes about how and when it was served;
- simplification of the statute, including removal of complex provisions and medico legal assessment costs around the timing of WPI assessments before the termination day, extensions to the termination day and special evaluations at the 2 year extended period;
- significant reduction in the administrative burden on all scheme stakeholders including workers, employers, insurers, AMS and WorkCover WA.

#### **Abolition of termination day**

**R:164** It is recommended the termination day regime be discontinued.

### **Election to pursue common law damages**

915. A 15% or greater WPI is the key threshold requirement for accessing common law. The Act currently enables parties to agree on the worker's level of WPI for the purpose of the Director recording the percentage, which in turn enables the worker to elect to pursue damages.
916. The issue of the level of impairment is a medical question and should not be open to negotiation between employers and workers. The Discussion Paper proposed WPI can only be assessed by an AMS and not agreed between the parties.
917. In addition, the Act requires the impairment and election to be recorded as separate administrative processes. The Discussion Paper proposed the recording of impairment and election processes be combined, where the recording of an assessment also includes an election. This proposal is not opposed by stakeholders and will be implemented as part of structural improvements in the new statute.

### **Stakeholder Submissions**

918. Stakeholder views are mixed regarding the requirement for an assessment of impairment to be undertaken (rather than agreed) in order for a worker to elect to pursue common law damages.
919. Submissions opposing the change argue it could result in costs being incurred in situations where satisfaction of impairment threshold is obvious and undisputed.



## Recommendation

920. Genuine common law claims will ordinarily require the level of impairment to be assessed in order to determine quantum of damages. WorkCover WA does not believe this is a significant impost on workers. The recommendation reinforces the role of AMS and the importance of the impairment thresholds being met prior to election.

### **Election to retain the right to seek damages**

**R:165** It is recommended a worker's whole person impairment must be certified by an Approved Medical Specialist in order for the Director to record the degree of impairment for the purpose of electing to pursue common law damages.

## Commencement of proceedings

921. Section 93K(4) sets out certain procedural and threshold requirements if the court is to have the power to award damages. These procedural requirements apply at the point of an award of damages and not the commencement of proceedings. This is an anomaly and has allowed the majority of common law settlements to be made without the key threshold and procedural requirements being met.

922. The Discussion Paper proposed that common law threshold and procedural requirements must be met in relation to an injury prior to the commencement of proceedings for damages. The current restrictions on the ability of a court to award damages unless the threshold requirements are met would continue to apply.

923. Similar to the requirements limiting the awarding of damages, the procedural requirements are:

- the worker's degree of WPI has been certified by an AMS as not less than 15%;
- the worker elects in the manner prescribed in regulations to retain the right to seek the damages;
- the Director registers the election and gives notice to the worker.

## Stakeholder Submissions

924. The majority of submissions made on the proposal support the requirement for procedural thresholds being met prior to commencement of proceedings.

925. Submissions opposing the change suggested there be no threshold at all (15% WPI) or the potential for the limitation period to pass before an assessment and election is recorded.



926. The Law Society queried the impact on common law proceedings against defendants other than the employer (e.g. a principal). The scenarios included:
- where a worker may meet the required level of WPI to elect and eligible to sue their employer but sues another tortfeasor instead;
  - whether an employer can be joined as a third party before an election or without the worker ever electing;
  - where the defendant wishes to join the employer as a third party on the basis it was a joint tortfeasor and whether this proposal affects the validity of the third party notice or will delay the worker's main action;
  - whether the Act will clarify whether the right of a non employer to claim contribution or indemnity from another tortfeasor (such as the worker's employer) will be constrained by the choice of a worker about whether to elect.

### Recommendation

927. It is important the integrity of the common law regime is preserved for workers with a significant injury who have met the procedural thresholds under the Act.
928. It is highly unlikely workers or their legal representatives would not have arranged a WPI assessment before the 3 year limitation period expires and should be aware that certain procedural requirements need to be met before commencing an action in the court.
929. Recent disputes in the Supreme Court have also demonstrated the legislation is somewhat unclear regarding whether the procedural gateways must be met sequentially prior to the commencement of proceedings.<sup>6</sup>
930. In relation to the issues raised by the Law Society, the Act currently permits workers to commence proceedings against principals without having to meet the common law WPI and election threshold. An action can commence at any time.
931. There are also existing provisions to protect an employer from contribution or indemnity if someone other than the employer is liable for damages. There is no intention to affect common law proceedings where a worker seeks to sue someone other than the employer or the indemnity arrangements under the Act. Any consequential amendments required will be addressed as part of the drafting process.

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<sup>6</sup> *St John of God Healthcare Inc v Austin* [2014] WASCA 11



### **Commencement of proceedings**

**R:166** It is recommended the new statute require the common law threshold and procedural requirements be met in relation to an injury prior to the commencement of proceedings for damages.

## Discussion Paper proposals not recommended in Final Report

### Common law settlements

932. Section 92(f) was enacted in 1981 to prevent double recovery of compensation and damages. It was not intended as a settlement pathway as such but to deal with the consequences of a settlement for damages on the future right to continue or commence a claim for compensation under the Act.
933. The majority of settlements currently filed under s92(f) are initiated by a writ without any assessment of WPI or election recorded and are not genuine common law settlements.
934. In the absence of the common law threshold requirements being met, these settlements are more appropriately characterised as statutory settlements and should be progressed under a statutory settlement pathway. The Compensation Part of this report proposes changes to the statutory settlement pathway.
935. As a consequence of proposals to establish clear pathways for the settlement of claims, the Discussion Paper proposed:
- the settlement of a claim for damages by agreement is void unless the common law threshold and procedural requirements are met in relation to the injury;
  - the new statute require the Director to disapprove a settlement filed under s92(f) if the common law threshold and procedural requirements are not met in relation to the injury.
936. This proposal is no longer required as the recommendation limiting the commencement of proceedings will prevent common law settlements where the procedural requirements are not met.

## Additional issues raised by stakeholders

### Settlement/ recovery involving third party actions

937. The Law Society submits the Act is unclear (ss92 and 93) about employers' right to recover workers' compensation expenses in circumstances where damages are paid under an agreement rather than a judgment. CCS Insurance Law also raised that an agreement to settle for damages should also finalise the workers' compensation claim and ss92 and 93 may need redrafting to clarify the consequences of settling a claim for damages and employers' compensation recovery rights.
938. It is understood the scenario requiring attention is where there is a settlement agreement in relation to a worker's claim for damages against a defendant only (non employer). A writ could be issued at any time since the constraints of the Act would not apply. However, the employer and workers' compensation insurer may be interested non parties to the litigation by virtue of having an interest in recovering benefits under the Act. In these circumstances the Law Society propose the inclusion of a specific provision for settlements with non employers and the compromise of workers' compensation recoveries.
939. WorkCover WA will seek advice from the State Solicitor's Office about recovery rights and settlement of claims with non employers as part of the drafting process. It is likely only minor changes, if any, are required as ss92 and 93 both create qualified rights of indemnity for the recovery of worker's compensation payments made by an employer in the event that some person other than the employer is liable to pay damages at common law.
940. Section 92 deals with occasions where a worker brings an action for damages against either the employer or a third person and, by addressing the various combinations of possibilities, establishes a regime where there cannot be recovery of both compensation and damages.
941. Section 93 deals with any occasion where some person other than the employer may be under a legal liability to pay damages and confers on the employer an indemnity (reducible in the case of contributory negligence by the worker or partial negligence by the employer) for the employer's liability to pay compensation under the Act. This applies regardless of whether that third person has discharged his or her liability to pay damages to the worker by judgment or by settlement or otherwise.



942. The Law Society also draw attention to an anomaly in s93(3) where WorkCover WA is nominated as the appropriate jurisdiction for determination of an employer's claim to be indemnified by a negligent third party. It also says such an application to WorkCover WA would have to be made in the first place by the worker. The Law Society submits in practice, employers' recovery actions for workers' compensation are litigated in the District Court.
943. WorkCover WA supports questions as to the right or amount of indemnity by a negligent third party being determined in the District Court, rather than by an arbitrator.

## Part 8 – Scheme regulation and administration

### General

944. The Scheme regulation Part of the new statute will set out the powers and functions of WorkCover WA along with Ministerial governance, role of the Minister and offences.
945. No significant changes are proposed in relation to the regulation and administration of the scheme.

### Proposed Part structure

946. The proposed high level structure of the Part is:
- WorkCover Western Australia Authority
    - Establishment and powers
    - Governance
    - Financial management
    - Information management
  - Powers of inspection
  - Offences

### Key changes

947. The key changes proposed to the Act are:
- what information must be provided to WorkCover WA;
  - information WorkCover WA can release to other parties;
  - a review of offences for inclusion in the new statute;
  - introduction of penalty units and an indexation process for penalties;
  - an extension of time for the giving of an infringement notice.

## Information management

948. The Discussion Paper proposed the new statute co-locate and amalgamate the following provisions where appropriate:
- the provision of information to WorkCover WA by insurers and self insurers;
  - confidentiality requirements;
  - exceptions to the confidentiality requirement.
949. The Act will be amended to clarify information held by the Conciliation and Arbitration Services is information held by WorkCover WA.
950. Along with general proposals to modernise the information management provisions, the Discussion Paper proposed the new statute provide clarity around the provision of information to WorkCover WA and when information may be released by WorkCover WA.

### Stakeholder submissions

951. Proposals are generally supported with insurers indicating a desire to be consulted in relation to:
- insurers ability to capture information sought and costs involved;
  - timeframes for implementing any changes relating to information exchange
  - the form in which information is provided.

### Recommendations

952. WorkCover WA is not intending to change its current practises in relation to requirements for information. It is acknowledged that currently, on occasions, information may be required from insurers at short notice. WorkCover WA sees the capacity to respond quickly to a situation should the need arise as integral to its regulatory role.
953. The recommendations seek to insure the new statute provides clarity in relation to information requirements and management of that information once it is held by WorkCover WA.

#### Information management

- R:167** It is recommended the new statute clearly outline:
- i) requirements for the provision of information to WorkCover WA;
  - ii) the circumstances where WorkCover WA may release information.

## Penalties and offences

### Offences

954. The penalties regime has not been reviewed in its entirety since the Act was first introduced in 1981.
955. A recent review of the penalties indicates in some cases fines under the Act are significantly lower than in other jurisdictions. The discrepancies are heightened in those jurisdictions where the fine is adjusted in relation to whether the offender is an individual or a corporation.

### Penalty units

956. The Discussion Paper proposed a review of the penalties and the introduction of penalty units to facilitate annual indexation of penalties.
957. All existing penalties have been reviewed and in most cases increases are recommended. The recommended changes reflect the seriousness of the offence and provide create greater parity with other jurisdictions.
958. Appendix 3 sets out recommended changes to existing penalties.

### Stakeholder submissions

959. Concerns were raised by stakeholders in relation to penalties generally under the Act including:
- fines do not distinguish between small and large employers;
  - fines are not set at a level that is a disincentive for large employers;
  - fines should be set at a level that encourages compliance with the Act.
960. WorkCover WA notes fines in the Act are the maximum amounts that can be imposed and the Courts are required, as far as practicable, to consider the financial position of the offender and the level of burden a fine will impose on them.<sup>7</sup>
961. It was suggested in submissions that a list of offences under the Act and accompanying penalties should be consolidated into a list and made available on the WorkCover WA website. WorkCover WA supports this initiative.

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<sup>7</sup> Section 53 *Sentencing Act 1995*.



962. Currently fines under the Act are in some cases significantly lower than in other jurisdictions. Penalties have been reviewed with a view to imposing a penalty that reflects the nature of the offence including consideration of:
- the impact that the offending behaviour has on other parties;
  - the capacity for that conduct to undermine fundamental premises of the scheme; and
  - the need to deter such behaviour in the future.
963. Appendix 3 contains a table of the recommended amendments to penalties existing under the Act. In some circumstances where provisions will be amalgamated and redrafted, the nature of the offence will change.

#### **Penalties**

**R:168** It is recommended the fines in the new statute be based on the reviewed amounts contained in Appendix 3 of this report.

**R:169** It is recommended a penalty unit system be introduced for all offences which includes automatic annual indexation.

### **Infringement notices**

964. The Act currently requires an infringement notice to be issued within six months after the offence is believed to have been committed. The Discussion Paper recommended this time limit be extended to 24 months to permit infringement notices to be issued in matters where an extended investigation has been required.
965. No submissions oppose this proposal.

#### **Infringement notice time frame**

**R:170** It is recommended the new statute enable infringement notices to be given within 24 months after the offence is believed to have been committed.

## Part 9 – Miscellaneous

### General

966. The Miscellaneous Part of the new statute will continue to be a point of reference for general matters that have application across the statute.

### Proposed Part structure

967. The Miscellaneous Part of the new statute will set out regulation making powers and general matters such as immunities and exemptions.

### Key changes

968. The key changes to this section will be amendments to the regulation making power.

### Regulations

969. The Miscellaneous Part of the new statute will set out regulation making powers and general matters such as immunities and exemptions.

970. The Discussion Paper proposed regulation provisions be located in the relevant Parts of the new statute. For example, s292(1)(b) relates to making regulations in respect of the Conciliation and Arbitration Services. This provision will be relocated to the Dispute Resolution Part of the new statute.

971. No submissions oppose this proposal.

#### **Regulation making powers**

**R:171** It is recommended regulation making powers currently be located in the relevant Parts of the new statute to which they relate.



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## Appendices

### Appendix 1 – Indicative structure of new statute

Part 1 - Preliminary	
Division 1 – General	
1	Short title
2	Commencement
3	Purposes
Division 2 — Application of the Act	
4	Application of the Act generally
5	Terms used
6	Local governments and other authorities
New	Definition of worker
New	Regulations relating to definition of worker
New	Work for private householders
New (7/8/9/10)	Religious workers
10A	Working directors
11	Sporting contestants
New	Jockeys
14	Workers employed by Crown
17	Crew of fishing vessel
New	Overseas workers
Division 3 – Employment connection with state	
20	Compensation not payable unless worker's employment connected with this State
23A	Definition [State of Connection]
23B	Determination of State with which worker's employment is connected in proceedings under this Act
23C	Determination by the District Court of State with which worker's employment is connected

23D	Recognition of previous determinations
23E	Determination may be made by consent
<b>Part 2 - Compensation</b>	
<b>Division 1 – Liability of Employer</b>	
18/19	Liability of employers to workers for injuries
22	Serious and willful misconduct
79	Willful and false representation
23	Person not to be compensated twice
<b>Division 2 - Making a claim</b>	
New	Terms used
178	Time for applying for compensation
New/57A(1) 57B(1)	Applying for compensation
New	Consent authority
57A(2A),(2)	Obligations of insured employers
New 57A(3) 57(B)(2)	Notification of liability decision
57(A)(5),(6) (7) ,(8A),(8) 57(B)(2),(4), (5),(7),(8)	Payment of compensation
New	Provisional payment
New	Subsequent incapacity
57A(6) 57B(5) 58	Arbitrator may determine liability
57B(2b)	Insurer declines to indemnify employer
New	Regulation making power
<b>Division 3 – Compensation entitlements</b>	
<b>Subdivision 1 - General</b>	
New	Purposes of Division
New	Definition of prescribed amount
<b>Subdivision 2 – Weekly payments of compensation</b>	

21	The entitlement to weekly payments
S1-7	Weekly payments for total incapacity
S1-7	Weekly payments for partial incapacity
New/S1-7(5)	How weekly payments are to be paid
New	Limit on compensation for weekly payments
217	Extension of entitlement weekly payments
56	Entitlement to weekly payments ceasing on account of age
Subdivision 2a – Calculation of earnings	
S1 - 11	Terms used
New	The calculation of earnings
New	Maximum weekly earnings
New	Minimum weekly earnings
New	Variation of weekly earnings
New	Concurrently employed workers
S1 - 14	Casual or seasonal workers
S1-15	Paid board or lodging
S1 - 16A	Weekly earnings of jockeys
New	Weekly earnings of directors
Subdivision 2b - Specific circumstances relating to weekly payments	
S1-8	Deemed total incapacity
81	Weekly payments and public holidays
New/82	Weekly payments and leave
New /S1-10	Weekly payments when seeking treatment
Subdivision 3 – Medical expenses	
New	Expenses definition (consolidation of all medical and allied health entitlements)
New	Limit on medical expenses
S1-18	Hospital charges
Subdivision 3a – Extension of Medical Expenses	
New	Terms used
18A(1), (1CA),(2),	Extension amount 1

(4)		
18D	Interim payments of Extension 1 expenses	
18(1b),(1C). (2aa)	Extension amount 2	
18(2aa), 18(C)	Impairment assessment	
18(2aa),(2a b)	Arbitrators determination	
18(2ac)	Management Plan	
18(2a)	Time for claiming Extension amount 2	
<b>Subdivision 4 – Other expenses</b>		
New	Other expenses definition <ul style="list-style-type: none"> <li>- First aid and emergency transport</li> <li>- Travelling (s1-19)</li> <li>- Impairment assessment for common law (c17(1aa))</li> <li>- Expenses associated with repair and replacement of prosthetic and other aids (cl17(3)(4))</li> <li>- prosthetic and other aids (c17(5))</li> <li>- clothing (cl17(6))</li> <li>- Workplace rehabilitation (cl17(1a))</li> </ul>	
	S1 - 18	Hospital charges
	New	Limit on other expenses
	<b>Subdivision 5 – Workplace rehabilitation</b>	
	New	Workplace rehabilitation definition
	S1-17(1a)	Limit on workplace rehabilitation
	<b>Division 4 – Compensation for specific types of injury and death</b>	
<b>Subdivision 1 – Permanent impairment (post 2005)</b>		
New, 31B	Definition of permanent impairment	
New ,31D	Determining degree of impairment	
New, 31C	Calculating compensation payable	
New	Accessing lump sum compensation for permanent impairment	
New,31I,31J	Effect of receiving lump sum compensation for permanent impairment	
New,31G	Further permanent impairment	
31F	Specific provision for AIDS	

Subdivision 2 – Noise induced hearing loss	
New	Terms used
31E	Lump sum compensation for noise induced hearing loss
31E	When entitlement arises
New, 31E(5),(6), Schedule 7	Measurement of NIHL
New, Schedule 7	Communication and storage of test results
Schedule 7	Employers obligations
New	Making a claim
New	Disputes
New	Apportionment between employers
New	Provision of insurance coverage details
New	Regulation making power
Subdivision 3 – Industrial diseases	
General	
32	Compensation of worker dying from or affected by certain industrial diseases (Schedule 3)
44	Disease deemed due to nature of employment
45	Additions to Schedule 3
40	Interpretation of this Division in cases of death without prior incapacity
41	Last employer liable but may join others
42	Relevant earnings
43	Employer to whom notice to be given
47	Certain workers not to benefit
Asbestos related disease	
New	Definition of asbestos disease
New	Asbestos diseases lump sum entitlement
34	Worker suffering from chronic bronchitis and pneumoconiosis (amended)
35	Worker suffering from lung cancer and pneumoconiosis
New	Successive lung diseases to be regarded as one
New	Special claim process for asbestos diseases



New	Asbestos Diseases Medical Panel establishment and determinations
37	Oral submission by medical practitioner
New/ 93K	Special provisions about common law assessment for ARDs.
39	Worker disabled by tuberculosis and pneumoconiosis
46	Compensation limited to prescribed amount
Subdivision 4 – Specified loss of functions	
49	Injury occurs when loss of function renders worker less able to earn full wages
Sch 4	Specified loss of functions
51	Compensation recoverable from last employer
52	How compensation calculated
53	Employer to whom notice given
54	Loss of function deemed due to nature of employment
55	Additions to Schedule 4
Subdivision 5 – Specified diseases contracted by firefighters	
49A	Terms used
49B	Application of subdivision
49C	When employment as firefighter taken to contribute to specified disease
49D	Date of injury
49E	Review of subdivision
Subdivision 6 – Compensation for death	
New	Terms used - dependents
New	Lump sum entitlement for death
New	Apportionment
New	Dependent children's allowance
New	Death – no dependent
New	Funeral expenses
New	Discharge of trust account payments
New	Effect of common law claims on trust arrangements
<b>Division 5 – Claim management</b>	
Subdivision 1 – Medical examinations	
64/65/66	Medical examination

66A	Additional medical examination
70	Furnishing medical reports
72A	Failure to undergo medical examination
Subdivision 2 – Varying compensation	
61	Discontinuance or reduction of weekly payments
59	Return to remunerated work with another employer
New	Application to vary weekly payments
63	Effect of suspension
New/69	Worker residing outside the Commonwealth
72	Suspension of payments during custody
71	Recovery of payments to unentitled person
Subdivision 3 – Disputes between employers or insurers	
73	Disputes between employers
74	Dispute between insurers
75	Obligation to make weekly payments preserved
<b>Division 6 – Settlement of claim (redemption)</b>	
New	Statutory settlement pathway
New	Effect of registration of settlement
<b>Part 3 – Injury management</b>	
<b>Division 1 - General</b>	
155	Terms used in this Part
157	Information about injury management matters
<b>Division 2 - Medical certificates and work capacity</b>	
New	Treating medical practitioners' role in injury management
New	Issuing of medical certificates
New	Provision of progress medical certificates
<b>Division 3 - Injury management system</b>	
155B	Establishment of injury management systems for employer's workers
155D(1) &(2)	Injury management system - insurers' obligations

<b>Division 4 – Return to work</b>	
Subdivision 1 – Return to work programs	
155C	Return to work program employers' obligations
155D(1),(2) & (3)	Return to work program insurers' obligations
New/156B/7 2B	Return to work program workers' obligations
Subdivision 2 – Dismissal, keeping position available and suitable duties	
New/84AB	Employer not to dismiss worker due to incapacity
New/84AA	Employer to keep position available or provide suitable duties during worker's incapacity
<b>Division 5 - Injury management case conferences</b>	
New	Injury management case conference
New	Injury management case conferences workers' obligations
New	Arbitrators' powers in relation to injury management case conferences
<b>Division 6 - Workplace rehabilitation</b>	
New	Approval of workplace rehabilitation providers
New	Implied condition of approval as a workplace rehabilitation provider
156A	Workplace rehabilitation services
<b>Division 7 – Medical and allied health services</b>	
New/292(2) &(3)	Fees for medical and allied health services
82	Recovery of cost of services rendered
<b>Part 4 - Medical assessment</b>	
<b>Division 1 – Assessing degree of impairment</b>	
146	Terms used
146R	WorkCover Guides
146A	Evaluation of impairment generally
146B	Evaluation of impairment for the purposes of schedule 2
146C	Evaluation of impairment for purposes of common law
146E	Evaluation for the purposes of an extension to medical expenses
<b>Division 2 – Approved medical specialists</b>	

Subdivision 1 – Approval of approved medical specialist (to be renamed approved permanent impairment assessors).

146F	Approval of approved medical specialist
New	Imposition of conditions on an approval
New	Audit of impairment assessments
New	Criteria for cancellation
New	Power to suspend

Subdivision 2 – Powers and duties of approved medical specialists

146G	Powers of an AMS
146H	Conduct of impairment assessment
146H	Report in relation to degree of impairment
146I	WorkCover to supply information
146J	Decisions of AMS
146H(5)	Error in report
New	Regulations

**Division 3 – Medical assessment panels**

New	Convening of medical panels
New	Panel members
New	Appointment to list of medical practitioners approved to sit on medical panels
New	Medical panels generally
New	Procedures of medical panels
New	Failure to comply with requirement of a medical panel
145E	Determinations
145F/New	Reconsidering determinations
New	Requirements for determinations involving permanent impairment or extension of medical expenses
New	Regulations

**Division 4 – Medical advisory committee**

New	Appointment of committee
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**Part 5 – Liability and Insurance**

**Division 1 – General**

159	Terms used
-----	------------

<b>Division 2 – Employers’ obligations</b>	
Subdivision 1 - Employers’ obligation to insure	
160	Employer to obtain insurance
New	Remuneration – audit and record keeping
New	Prohibition on insurance covering certain contractual indemnities
170	Failure to insure
172	WorkCover WA may recover underpaid premiums from employers
New	Insurance for specified industrial diseases
302	Deductions towards compensation not lawful
Subdivision 2 – Deemed employers	
175	Principal contractor and sub-contractor deemed employers
303A	Making employment conditional on avoidance arrangement
175AA	Certain persons deemed workers
<b>Division 3 – Licensed insurers</b>	
Subdivision 1 – Licensing and renewal	
161	Application for licence
New	Determination of application
New	Special provisions for specialised insurers
New	Conditions on licence
New	Duration of licence
New	Monitoring and audit
New	Cancellation or suspension by WorkCover WA
New	Cancellation of licence on request
New	Public sector – Insurance Commission of WA
Subdivision 2 – Insurers’ obligations	
New	Obligation to insure
161A	Penalty – issue or renewal of policy without licence
169	Terms of insurance and form of policies
New	Burning cost policies
New	Lapsed policies
New	Cancelled policies



New	Non-payment of premium
160A	Insurance in respect of working directors
173	Worker's rights against insurer
174A	Insurer may not refuse to indemnify in certain circumstances
<b>Division 4 – Self insurance</b>	
Subdivision 1 – Licensing and renewal	
New	Applications for licence
New	Determination of application
New	Provisions relating to licences
New	Cancellation of licence on request
Subdivision 2 – Self insurer securities	
New	Bank guarantee/security required for self insurers
New	Use of security by WorkCover WA
New	Payment to worker from safety net fund
New	Claim management
<b>Division 5 – Premium rates</b>	
151	Fixing premiums
151A	Report as to rates
152	Loading not to exceed 75%
153	Fixing maximum loading or discount
153A	Minimum premiums
154	Appeals
<b>Division 6 – Uninsured claims</b>	
174	Payment to worker from General Account
New	Liability of principal contractor where employer uninsured
174AAA	Setting aside certain judgments and agreements
174AA	Recovery from responsible officers of body corporate
174AB	WorkCover WA may exercise rights of employer
174AC	WorkCover WA's rights of indemnity and subrogation
174AD	Employers' duty to assist WorkCover WA
<b>Division 7 – Acts of terrorism</b>	

New	Definition of 'Act of Terrorism'
New	Exclusion of cover for acts of terrorism from indemnity policies
New	Ministerial declaration
New	Contribution of insurers and self insurers
New	Collective liability cap for insurers and self insurers
New	Claim process and management
New	Regulation making power for apportionment methodology
New	Exclusion of common law liabilities
<b>Part 6 – Dispute resolution</b>	
<b>Division 1 – General</b>	
176	Exclusive jurisdiction of arbitrators
177	Object of this Part
180	Relevant documents to be provided by parties
305	Immunity
307	No liability for publishing decisions
New	Regulations
<b>Division 2 – Conciliation</b>	
Subdivision 1 – Workers' compensation conciliation service	
181	Workers' Compensation Conciliation Service established
182A	Director, Conciliation, designation and functions of
182B	Conciliation officers, designation of etc.
182C	Provisions about designations
182D	Delegation by Director
Subdivision 2 - Resolution of disputes by conciliation	
182E	Application for conciliation
182F	Acceptance of application by Director
182G	Director to allocate dispute
182H	Director may certify dispute is not suitable for conciliation
182I	Duties of conciliation officers
182J	Powers of conciliation officers
182K	Weekly payments etc., conciliation officers may direct etc.

182L	Suspending and reducing weekly payments, conciliation officers' powers for etc.
182M	Provisions about directions
182N	Finalising orders
182O	Conclusion of conciliation and certificate of outcome
Subdivision 3 - Practice and procedure	
182P	Obtaining information
182Q	Scope of conciliation
182R	Conciliation officer may provide information to another party or a medical practitioner
182S/New	Representation
182T	Litigation guardians, rules about
182U	Interpreters and assistants
182V	Ways of conducting conciliation
182W	Conciliation to be in private
182X	Meetings and conferences, notice of and failure to attend
182Y	Privilege against self incrimination
182ZA	Legal professional privilege in relation to medical reports
182ZB	Other claims of privilege
182ZC	Documents produced, use of etc. by conciliation officer
182ZD	Medical dispute may be referred to medical assessment panel
Subdivision 4 - General provisions about directions, orders and conciliation agreements	
182ZE	Terms used
182ZF	When decision or conciliation agreement has effect
182ZG	Correcting mistakes
182ZH	Enforcing decisions and conciliation agreements
182ZI	Conciliation decisions not reviewable
182ZJ	Provisions about revoked directions
182ZK	Recovery of payments made under s. 182K direction
182ZL	Director may order insurer to make payment directed under s. 182K
Subdivision 5 - Miscellaneous	
182ZM	Statement made to conciliation officer not admissible in subsequent proceedings





182ZN	To whom compensation is to be paid
<b>Division 3 - Arbitration</b>	
Subdivision 1- Workers' compensation arbitration service	
182ZO	Workers' Compensation Arbitration Service established
182ZP	Registrar, Arbitration, designation and functions of
182ZQ	Arbitrators, designation of etc.
182ZR	Provisions about designations
182ZS	Delegation by Registrar
Subdivision 2 - Determination of disputes by arbitration	
182ZT	Application for arbitration
182ZU	Acceptance of application by Registrar
182ZV	Registrar to allocate dispute
182	Who is to be given a copy of an application
183	Information exchange by parties
185	Duties of arbitrators
Subdivision 3 - Practice and procedure	
188	Practice and procedure, generally
189	Relief or redress granted need not be restricted to claim
190	Directions by arbitrator
191	Dependants of workers, proof as to
192	Illegal contracts of employment may be treated as valid
193	Arbitrator's powers to obtain information
194	Arbitrator may give information etc. to and restrict disclosure by other party or medical practitioner
New/195	Representation
196	Litigation guardians, rules about
197	Interpreters and assistants
198	Ways of conducting arbitration proceedings
199	Hearings to be in private
200	Hearings, notice of and failure to attend
201	Experts, use of by arbitrators
202	Summoning witnesses



203	Arbitrator's powers as to witnesses
204A	Communication between worker and WorkCover WA employee not admissible
204	Privilege against self incrimination
205	Legal professional privilege in relation to medical reports
206	Other claims of privilege
207	Oaths and affirmations
208	Arbitrator may authorise another to take evidence
209	Things produced, use of etc. by arbitrator
210	Medical dispute may be referred to medical assessment panel
<b>Subdivision 4 – Decisions</b>	
211	Decisions generally
212	Conditional and ancillary orders and directions
213	Decisions and reasons, form and content of
214	Validity of decision not affected by contravention of this Subdivision
215	When decision has effect
216	Correcting mistakes
217A	Arbitrator may reconsider decision if new information
217B	Arbitration decisions not reviewable
217	Order as to total liability of employer
218	Person under legal disability and dependants of dead workers, payment to etc.
219	Enforcing decisions
<b>Subdivision 5 - Miscellaneous</b>	
220	Statements to arbitrators not admissible in common law proceedings
221	To whom compensation is to be paid
222	Interest on sums to be paid
223	Interest on unpaid sums
224	Interest on unpaid amount of agreed sum
225	Regulations may exclude interest
<b>Division 4 - Rules and practice notes</b>	
293A.	Conciliation rules
293B.	Arbitration rules

293	General provisions about rules
294	Practice notes
<b>Subdivision 5 - Offences</b>	
255	Failing to comply with decision of dispute resolution authority
256	Failing to comply with summons or requirement to attend
257	Failing to give evidence as required 316
258	Giving false or misleading information
<b>Division 6 - Appeals to District Court</b>	
247	Appeal against arbitrator's decision made under Part XI
250	Effect of appeal on decision under appeal
254	Appeal from District Court to Court of Appeal
<b>Division 7 - Costs</b>	
Subdivision 1 - General	
261	Terms used
262	Costs to which this Part applies
263	This Part prevails over Legal Profession Act 2008
Subdivision 2 - Costs of parties in proceedings and costs of proceedings	
264	Costs to be determined by dispute resolution authority
265	Costs unreasonably incurred by representative
267	Appeal costs
268	Regulations for assessment of costs
Subdivision 3 – Maximum costs	
269	Costs Committee, membership of
270A	Remuneration of Committee members
270	Constitution and procedure of Costs Committee
271	Determinations as to maximum costs
272	Making determinations
273	Approval and publication of determinations
274	Effect of costs determinations
275	Agreement as to costs, limits on
276	Division does not affect s. 87 in relation to Part IV actions

## Part 7 – Common law

### Division 1 - General

#### Subdivision 1 – Application of division

93A	Terms used
93B	Application of this Division
93C	Limit on powers of courts
93H	Terms used in this Subdivision
93I	Application of this Subdivision
85	Motor vehicle cases not affected by this Part
86	Liability independent of this Act not affected by this part
92	Both damages and workers' compensation not recoverable
93	Remedies against non-employers
87	Solicitor-client costs, limits on agreements as to
91	Court's duties where action for damages unsuccessful but workers' compensation is payable
93S	Regulations

#### Subdivision 2 – Choice of law

93AC	What constitutes injury and employment
93AE	Meaning of 'substantive law'
93AA	Applicable substantive law for work injury claims
93AB	Claims to which Division applies
93AD	Claim in respect of death included
93AF	Availability of action in another State not relevant

### Division 2 – Constraints on award of damages

New	Threshold requirements for the commencement of proceedings and awarding of damages
New/93K	Restrictions on amount of damages
93J	No damages for noise induced hearing loss if not an injury
93P	How election may affect stationary compensation
93Q	Special provisions about HIV and AIDS

## Part 8 – Scheme regulation and administration



**Division 1 - WorkCover Western Australia Authority**

**Subdivision 1 – Establishment and powers**

94	WorkCover Western Australia Authority
95	WorkCover WA's governing body
96	Term of office
98	Defects not to invalidate proceedings
99	Conditions of appointment
100	Functions of WorkCover WA
102	Limitation on powers
101	Powers
100A	Advisory committees
295	Public Service
101AA	Delegation by WorkCover WA
296	Delegation by chief executive officer

**Subdivision 2 – Governance**

97	Meetings
111	Minister may give directions
111A	Minister to have access to information
104AA	Disclosure of interests
104AB	Exclusion of interested member
104AC	Resolution that section 104AB inapplicable
104AD	Quorum where section 104AB applies
104AE	Minister may declare sections 104AB and 104AD inapplicable

**Subdivision 3 – Financial management**

105	Application of Financial Administration and Audit Act 1985
106	General Account
107	Estimates
108	Total contributions
109	Contributions to General Account by insurers
110	Trust Account
101A	Borrowings by WorkCover WA



101B	Guarantees of borrowings
Subdivision 4 – Information management	
New/103A/ 171	Information provided to WorkCover WA
New	Release of information under this Act
314	WorkCover WA may specify form of sending information
104	Publishing and furnishing information
100B	Disclosing information to occupational safety and health department
300	District Court to provide information to WorkCover WA
<b>Division 2 – Powers of inspection</b>	
175A	Authorisation
175B	Powers
175C	Interpreters
175D	Offences
<b>Division 3 – Offences</b>	
Subdivision 1 – General	
New	Penalty unit and indexation
309	Who can take proceedings for offences
310	Time limit for taking proceedings
312	Fines
313	Penalties not affected
308	Fraud
Subdivision 2 – Infringement notices and modified penalties	
175E	Definitions [Authorised officer]
175F	Authorised officers
175G	Giving of notice
175H	Content of notice
175I	Extension of time
175J	Withdrawal of notice
175K	Benefit of paying modified penalty
175L	No admission implied by payment
175M	Application of penalties collected

**Part 9 - Miscellaneous**

292	Regulations
297	Agreements and receipts under this Act exempt from stamp duty
299	Judicial notice
301	Prohibition of contracting out
303	Payments not assignable
304	Protection from liability
306	Protection from compliance with this Act
298	Order for detention of ship
New	Repeal, savings and transitional
New	Review of Act

**Schedule 1 – Permanent impairment**

Table	Table of compensation
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**Schedule 2 – Specified industrial diseases**

Table	Specified industrial diseases
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**Schedule 3 – Specified diseases for firefighters**

Table	Specified diseases for firefighters
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**Schedule 4 – Adjacent areas**

	Adjacent areas
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**Schedule 5 – Repeal, savings and transitional**
**Division 1 - General**

316	Definitions
317	Repeal
318	Operation of Interpretation Act 1918
319	No renewal of liability or entitlement
320	Moneys paid under repealed Act taken into account
321	Compensation for injuries mentioned in Schedule 2
322	Child's allowance
323	Continuation

324	References to the Board, the Supplementary Board or officers
12	Compensation not payable for injuries prior to 28 Nov 1977
13	Act s.11 and 12 do not affect case where compensation paid prior to 28 Nov 1977
325	Transitional provisions (Sch 8)
New	Mining employers' insurance obligations
<b>Division 2 – Pre 2005 regime</b>	
Subdivision 1 – Permanent impairment	
New	Application of this Division
24	Compensation for injuries mentioned in Schedule 2 [pre-2005 SCH2]
24A	Lump sum compensation for noise induced hearing loss [pre-2005 SCH2]
24B	Election under section 24 or 24A [pre-2005 SCH2]
25	'Loss of ' [pre-2005 SCH2]
26	Subsequent injuries [pre-2005 SCH2]
27	Compensation in accordance with table at date of accident [pre-2005 SCH2]
28	Limit on compensation of worker electing [pre-2005 SCH2]
29	Compensation while incapacity continues [pre-2005 SCH2]
30	Compensation payable before election [pre-2005 SCH2]
31	Schedule 2 interpretation [pre-2005 SCH2]
Subdivision 2 – Common law	
93CA	Meaning of 'AMA Guides' in this Subdivision
93CB	Limits on application of this Subdivision
93CC	Application of this Subdivision
93D	Assessment of disability
93E	Restrictions on awarding of damages and payment of compensation
93EC	Extended time for commencing proceedings
93F	Restrictions on awarding and amount of damages if disability less than 30%
93G	Regulations
154AC	Regulations for subsidy from Supplementation Fund



## Appendix 2 – Repealed provisions

Section	Heading	Reason for repeal
5A	Indexation of certain amounts	Relocated to regulations
12	Compensation not payable in some cases for injury or death before 28 Nov 1977	Historical/obsolete
13	Act s. 11 and 12 do not affect case where compensation paid before 28 Nov 1977	Historical/obsolete
16	Act to apply as to injury to persons employed on Western Australian ships	Historical/obsolete
21	Compensation from date of incapacity	New provisions
31E	Lump sum compensation for noise induced hearing loss	Revised NIHL regime
31K	Compensation payable before election [post-2005 SCH2]	Revised permanent impairment
47	Some workers not entitled to compensation	Historical/obsolete
48	Notification of disease	Obsolete
56	Age	No age limits – no provision needed
57	Age	No age limits – no provision needed
58	Age	No age limits – no provision needed
57C	Notification to Commission	New information management provisions
57D	Confidentiality	
60	Application to discontinue or reduce weekly payments	New provision
62	Review of weekly payments	
64(2)	Does not apply to certain elections	Intent outdated
67	Lump sum in redemption of weekly payments	New settlement regime
68	Calculation of lump sum	New settlement regime
74A	Pre 1990 dispute between employer matters	Obsolete



Section	Heading	Reason for repeal
76	Registration of memorandum of agreement	New settlement regime
77	Registration obligatory	New settlement regime
78	Effect of non-registration of agreement	New settlement regime
80	Effect on annual leave, long service leave and sick leave	New provisions
83	Awards and partial capacity	Section 83 of the Act relates to employment of an award based worker at a proportion of the wage under their award if the worker is rendered less able to earn full wages by reason of an injury. The provision employs archaic language (“...rendered less able...”) and WorkCover WA is unaware of the provision being used by stakeholders.
84	Worker not to be prejudiced by resuming work	It is reasonable where a worker returns to work, whether due to a certified capacity for work or voluntarily, the employer is able to resume the worker’s wages and cease weekly payments of compensation in accordance with the provisions of the Act. If the worker is subsequently not able to continue to work, then compensation will again be payable if the inability to continue work is due to a certified incapacity for work.
93EA	Referring questions with fresh evidence in particular cases	Obsolete
93EB	Referring questions in certain other cases	Obsolete
93EC	Time for commencing action for damages extended in some cases	Obsolete
93O	Employer to give worker notice of certain things	Termination day abolished
93M	Termination day	

Section	Heading	Reason for repeal
93N	Special evaluation if condition has not sufficiently stabilised	
94(1)	Name of WorkCover Pre and Post 2004	Not required
145B	Register of eligible panel members	New provisions
146S	Register for panel membership	Revised medical panel process
146T	Panel to be constituted	
146U	Procedures	
146V	Assessments	
146W	Remuneration	
146D	Evaluation for the purposes of Part IXA	
146G(2) (3)	Capacity to fine worker or employer who fails to comply	
146G(4)	Power of a court to order a stay of proceedings	
146K	Panel to be constituted	
146L	Procedures	
146M	Failure to comply with requirement of approved medical specialist panel	
146N	Assessment of impairment by approved medical specialist panel	
146O	Outcome of assessment by approved medical specialist panel	
146P	No assessment without unanimous agreement	
146Q	Remuneration	
154A	Regulations for provision of information	Not operational
154AB	Special directions by Minister	Obsolete
154AC	Regulations for subsidy from Supplementation Fund	Obsolete
155A	Code of practice (injury	Key content located in operative



Section	Heading	Reason for repeal
	management)	provisions
155E	WCWA powers re: RTW programs	No longer a function of WorkCover WA
156	Approval of vocational rehabilitation providers	New regime for workplace rehabilitation provider approval
157(3),(4)	Use of facilities for IM Arbitrator may request IM info	Not a function of WorkCover WA Redundant
157B	Mediation and assistance	No longer a function of WorkCover WA
158	Meaning of "retraining criteria"	Specialised retraining discontinued
158A	Eligibility to participate in specialised retraining programs	
158B	Final day for recording agreed matters, referring disputed matters for determination	
158C	Disputes as to degree of permanent whole of person impairment	
158D	Disputes as to retraining criteria	
158E	Specialised retraining program agreements	
158F	WorkCover WA to direct payments in relation to specialised retraining programs	
158G	Obligations of employers, insurers	
158H	3 monthly reviews of performance, payments under specialised retraining programs	
158I	WorkCover WA may direct modification, suspension, cessation of payments under SRPs	
158J	Cessation of payments	
158K	Directions not open to challenge etc	
158L	Other effects of participation in specialised retraining program	
162	The State Government Insurance Commission sole insurer against	Repealed (policy amendment)

Section	Heading	Reason for repeal
	certain industrial diseases	
163	Payment of industrial disease premium and issue of policy	Repealed (policy amendment)
178	Notice of injury, and claim for compensation, requirements for	New claim process
179	Notice of injury, service of	New claim process
266	Agent's costs	Registered agents regime discontinued
277	Registration of agents	
292(4)(5)	Requirement to negotiate re:fees	Discontinued
299(c)(i)	Official signature of person under 1912 Act	Outdated
311	General penalty	Discontinued
315	Prescribed amount and Amounts A and C, publication of	Discontinued requirement – will be located in regulations where required
S1 - 1	Death — dependants totally dependent — notional residual entitlement	New regime for death entitlements.
S1 - 1A	Death — dependants totally dependent — child's allowance	
S1 - 1B	Death — dependants totally dependent — notional residual entitlement or child's allowance	
S1 - 1C	Determination of entitlement under clause 1B	
S1 - 2	Death — partial dependants who are not children	
S1 - 3	Death — partial dependants who are children	
S1 - 4	Death — no dependant	
S1 - 5	Death — where not resulting from the injury but weekly payments had been made	
S1 – 7(4)	WPs not impact medicals	Not required.
S1 – 7(6)	Totally incapacitated if ordered to RTW program	Remove intent.

Section	Heading	Reason for repeal
S1 - 9	No incapacity — medical expenses	New provisions
S1 - 12	Part-time workers	New calculation of weekly earnings – provisions redundant.
S1 - 13	Concurrent contracts	
S5 - 1	Definitions	Provisions relocated and discontinued in part.
S5 - 2	Incapacity for work resulting from injuries other than pneumoconiosis, mesothelioma and lung cancer	
S5 - 3	Incapacity for work resulting from injuries of pneumoconiosis, mesothelioma and lung cancer — weekly payments	
S5 - 4	Election to take redemption amount as lump sum or supplementary amount weekly	
S5 - 5	Requirements for election under clause 4	
S5 - 6	Effect of receiving the redemption amount as a lump sum	
S5 - 7	Effect of receiving supplementary amount	
S5 - 8	Payment of supplementary amount	
S5 - 9	Death of a worker prior to commencement of section 49 of Workers' Compensation and Assistance Amendment Act 1990	
S1-18B(3)	Final Day for cl18A(1b) application	No longer applies due to time frames ( within 8 weeks of operation of 141(22) of <i>Workers Compensation Reform Act 2004</i> Operational date 14 November 2005



## Appendix 3 – Proposed amendments to current penalties

No.	Section	Penalty	Proposed	No.	Section	Penalty	Proposed	No.	Section	Penalty	Proposed
1	s36(2)	2000	Repealed	14	s57C(3)	1000	Repealed	28	s103A(2)	2000	10 000
2	s48(1) s48(3)	100	Repealed	15	s57C(4)	1000	Repealed	29	s104AA(1)	10 000	10 000
3	s57A (4) (8A) (8)	1000	5000	16	s57D	1000	Repealed	30	s109(3)	2000	15 000
4	s57A(2A)	1000	5000	17	s59(2)	500	Repealed	31	s109(4a)	5000	15 000
5	s57A(3)	1000	5000	18	s59(6)	500	Repealed	32	s109(4b)	2 000 and a daily penalty not exceeding 100	10 000 and a daily penalty not exceeding 500
6	s57A(4)		Repealed	19	s59(8)	2 000	10 000	33	s109(6)	a penalty of 2000 and a daily penalty not exceeding 100	10 000 and a daily penalty not exceeding 500
7	s57A(8A)	2000	10 000	20	s61(2a)	2000	Repealed	34	s109(7)	5000	15 000
8	s57A(8)	2 000	10 000	21	s61(5)	2 000	10 000	35	s146G(2a)	2000	Repealed
9	s57B (2)	1000	5000	22	s67(7)	2000	10 000	36	s146G(3)	2000	10000
10	s57B(2b)	1000	10 000	23	s70(2)	2000	Repealed	37	s146L	2000 for a contravention of the requirement	Repealed
11	s57B(3)	1000	Repealed	24	s94	2000	10 000	38	s146M(3)	5000	5000
12	s57B(8)	2000	10000	25	s75(2)	1000	10 000				
13	s57C(2)	1000	Repealed	26	s84AA (1)	5000	10 000				



No.	Section	Penalty	Proposed
39	s152	1000	10 000
40	s155B	2000	5000
41	s155C(1)	2000	5000
42	s155C(3)	2000	5000
43	s155D(3)	2000	10 000
44	s160(3)	2000	10 000
45	s160(3a)	1000	5 000
46	s160(5)	2000	15 000
47	s160(7)	2 000	5000
48	s161A	5000	15 000
49	s162(1a)	1000	Repealed
50	s165	1000	15 000
51	s170(1)	A penalty of 5000 for each worker Unpaid premium to be awarded	A penalty of 10 000 for each worker Unpaid premium to be awarded

No.	Section	Penalty	Proposed
52	s171(1)	1000	10 000
53	(3)	2000	15 000
54	(4)	2000	10 000
55	s174AD(2)	5000	15 000
56	s175AA	2000	15 000
57	s175A(3)	2000	10 000
58	s175D	5000	15 000
59	s180(5)	1000	5000
60	s183(2)	2000	5000
61	s255(1)	5000	15 000
62	256	2000	5 000
63	s257	2000	5 000
64	s258	5000	15 000

No.	Section	Penalty	Proposed
65	s259	2000	10 000
66	s292(1)(i)	1000	5000
67	s298(5)	5000	15 000
68	s298(6)	Penalty at the rate of 200 for every day	Penalty at the rate of 500 for every day
69	s302(3)	2000	15 000
70	s303(2)	5000	10 000
71	s303A(1)	5000	15 000
72	s308	5000	15 000
73	s311	2000	Repealed
74	Schedule 1 Clause 18A	1000	5000
75	Schedule 7 Clause3	2000	10 000
76	Schedule 7 Clause4(4)	2000	5 000



## Appendix 4 – List of stakeholder submissions

Representative groups and special interest groups	
Asbestos Diseases Society of Australia Inc.	ADS
Audiology Australia	
Australian Medical Association Western Australia	AMA
Australian Petroleum Production & Exploration Association (Western Australia)	APPEA
Australian Physiotherapy Association (Western Australia Branch)	APA
Australian Psychological Society	APS
Australian Rehabilitation Providers Association Western Australia	ARPA
Chamber of Commerce and Industry Western Australia	CCI
Chamber of Minerals and Energy of Western Australia	CME
Civil Contractors Federation (Western Australia Branch)	CCF
Combined Small Business Alliance of Western Australia (Inc)	CoSBA
Exercise & Sports Science Australia	ESSA
Faculty of Pain Medicine, Australia and New Zealand College of Anaesthetists	
Housing Industry Association Ltd (Western Australia)	HIA
Insurance Commission of Western Australia	ICWA
Insurance Council of Australia Limited	ICA
National Insurance Brokers Association of Australia	NIBA
Printing Industries Association of Australia (Western Australia)	PIAA
Self Insurer's Association of Western Australia	SIAWA
The Australasian Faculty of Occupational and Environmental Medicine (Western Australia)	AFOEM
The Australian Pain Society	
The Law Society of Western Australia	Law Society
UnionsWA	
Private/individual submissions	
Aurenda (Western Australia)	
BHP Billiton (Western Australia)	



CGU Insurance (Western Australia)	
CLP Legal Pty Ltd (Western Australia)	
Dan Ebrall (Precision Acoustics Western Australia)	
Department of Commerce, WorkSafe division	WorkSafe WA
Department of Education (Western Australia)	
Department of Health (Western Australia)	
Department of Mines and Petroleum (Western Australia)	
Department of the Attorney General (Western Australia)	
Dr Alan Home	
Dr Alastair A.J Mackendrick	
Dr Ian Mitchell	
Dr Peter Connaughton	
Dr Robert McWilliam	
Guardian Exercise Rehabilitation (Western Australia)	
Hall and Prior Residential Health & Aged Care Organisation (Western Australia)	
LGIS WorkCare (Western Australia)	LGIS
Mr Ashley Wheeler (Precision Acoustics Western Australia)	
Mr Erik Fry (Instrulabs Pty. Ltd. Western Australia)	
Mr Giulio Petrella	
Mr Ian Wheeler (Precision Acoustics Western Australia)	
Mr Michael Levchenko	
Mr Peter Parker	
Mr Philip Grey	
Mr P V Lansell	
Mr Scurr	
PricewaterhouseCoopers (Western Australia)	PwC
Programmed (Western Australia)	
Public Sector Commission (Western Australia)	
QBE Insurance (Australia) Limited	
Rio Tinto Limited (Western Australia)	
Shine Lawyers (Western Australia)	



Slater & Gordon Lawyers (Western Australia) – Submission 1 (re: all)	Slater & Gordon
Slater & Gordon Lawyers (Western Australia) – Submission 2 (re: Asbestos proposals)	
South Metropolitan Health Services	
State Solicitor’s Office (Western Australia)	
Stephanie Hammersley	
Strathearn Insurance Brokers (Western Australia)	
The Hearing Company (Western Australia)	
Wesfarmers Group TeamCover	
Western Australia’s Individualised Services	
Woodside Energy Ltd	

## Appendix 5 – Glossary

Term	Abbreviation
Approved Medical Specialist	AMS
Asbestos Diseases Medical Panel	ADMP
Asbestos related disease	ARD
Australian Business Number	ABN
Australian Taxation Office	ATO
<i>Code of Practice (injury management)</i>	the Code
Compensation (Industrial Diseases) Fund	CIDF
WorkCover WA's Conciliation and Arbitration Services	Conciliation and Arbitration Services
Medical Assessment Panel	MAP
Noise induced hearing loss	NIHL
Otorhinolaryngologist	ENT
Pay As You Go	PAYG
<i>Review of the Workers' Compensation and Injury Management Act 1981: Discussion Paper</i>	Discussion Paper
<i>Review of the Workers' Compensation and Injury Management Act 1981: Final Report</i>	Final Report
Whole Person Impairment	WPI
<i>Workers' Compensation and Injury Management Act 1981 - Legislative Review 2009, December 2009</i>	Legislative Review 2009
<i>Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001</i>	the Terrorism Act
<i>Workers' Compensation and Injury Management Act 1981</i>	the Act



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