



## **EXPLANATORY MEMORANDUM**

# **WORKERS' COMPENSATION AND INJURY MANAGEMENT AMENDMENT BILL 2011**

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#### INTRODUCTION

The Workers' Compensation and Injury Management Amendment Bill 2011 has been developed to implement certain recommendations arising from WorkCover WA's 2009 legislative review. In response to the legislative review, the Government approved a two stage program of reform to workers' compensation laws.

The first stage delivers amendments to address current legislative anomalies and a number of policy issues. The second stage of the legislative program will involve the development of a new workers' compensation statute based on contemporary language and drafting conventions. The remaining recommendations arising from the 2009 legislative review will also be addressed in the second stage.

The Amendment Bill implements 34 of the 66 review recommendations. There are four broad elements to the Bill:

- implementation of the policy decision to remove age-based limits on workers' compensation entitlements;
- establishment of a common law safety net that will enable workers employed by uninsured employers to receive their lawful common law entitlements;
- restructuring of the dispute resolution framework; and
- general amendments to address a number of unrelated legislative anomalies and inefficiencies.

#### PART 1 – PRELIMINARY

Clause 1           **Short title**

This clause sets out the short title of the Act.

Clause 2           **Commencement**

This clause provides for the proposed Act to come into operation as follows:

- Sections 1 and 2 on the day on which the Act receives Royal Assent;
- the remainder of the Act on a day fixed by proclamation. Different days may be fixed for different provisions.

Clause 3           **Act amended**

This clause specifies the Act to be amended as the *Workers' Compensation and Injury Management Act 1981*.

## **PART 2 – AMENDMENTS ABOUT DISPUTE RESOLUTION**

### **Division 1 — Main amendments**

Clause 4           **Section 177 replaced**  
This clause establishes the objectives of the amended dispute resolution arrangements. The objectives provide for a focus on a fair and cost effective system for the resolution of disputes that is timely, accessible, approachable and professional. An amended version of the existing s.177 has been relocated as s.204A.

Clause 5           **Heading to Part XI Division 3 replaced**  
This clause creates the legislative structure for the Workers' Compensation Conciliation Service.

Clause 6           **Section 181 replaced**  
This clause establishes the Workers' Compensation Conciliation Service. The existing s.181 is replaced by provisions (new s.182A to s.182ZV) covering the establishment and operations of the Conciliation and Arbitration Services.

#### **Section 182A - Director**

Section 182A describes the legislative responsibilities and functions of the Director of the Conciliation Service. The Director is the divisional head of the Conciliation Service and, in addition to overall management of the Service, will continue to exercise the “registration” functions currently vested in the Director, Dispute Resolution Directorate. The Director is not subject to management or direction of the chief executive officer in respect to a decision or discretion in relation to any particular dispute.

#### **Section 182B - Conciliation officers**

Section 182B establishes the manner in which the chief executive officer may appoint persons to the role of conciliation officer and the terms and conditions of those appointments. Conciliation officers are not subject to management or direction in respect to a decision or discretion in relation to any particular dispute.

#### **Section 182C - Provisions about designations**

Section 182C determines the basis on which the Director and conciliation officers will be formally designated and the circumstances in which designation ceases to have effect.

#### **Section 182D - Delegation by Director**

Section 182D empowers the Director to delegate a power or responsibility to another officer of WorkCover WA or a conciliation officer appointed on a sessional basis.

#### **Section 182E - Application for conciliation**

This is an enabling provision with the effect of making conciliation a compulsory requirement in the overall dispute resolution function.

**Section 182F - Acceptance of application**

Section 182F establishes the requirements that must be fulfilled for the Director to accept an application for conciliation. The parties are required to make reasonable attempts to resolve a matter before making an application for conciliation.

**Section 182G - Director to allocate dispute**

Section 182G requires the Director to allocate a dispute, once accepted, to a conciliation officer.

**Section 182H - Director may certify that dispute is not suitable for conciliation**

Section 182H provides for matters to be fast tracked through the Conciliation Service where the Director is of the view that no matter in dispute is suitable for conciliation. This will expedite dispute resolution where conciliation is not likely to produce any benefit for the parties.

**Section 182I - Conciliation process**

Section 182I establishes how conciliation officers will undertake their responsibilities and the principles that must be adhered to in doing so. Conciliation officers are to make all reasonable efforts to bring the parties to the dispute to an agreement acceptable to all of them. Conciliation officers are required to act fairly, economically, informally and quickly according to the substantial merits of the case without regard to technicalities and legal forms.

**Section 182J - Powers**

Section 182J establishes powers that will allow conciliation officers to require parties to attend meetings and conferences, to answer questions and to produce documents.

**Section 182K - Payment directions**

Section 182K enables conciliation officers to direct that compensation payments be made while a dispute is being resolved or in relation to minor matters. This section (with s.182L and s.182M) effectively replaces the current Part XII of the Act which contains provisions that allow workers to obtain temporary relief in relation to applications while the substantive issues are being determined or in the disposition of minor matters. The new provisions, to be exercised by conciliation officers, essentially replicate the limits of those powers currently available to arbitrators in the existing Part XII, which is repealed.

### **Section 182L - Interim suspension or reduction directions**

Section 182L enables conciliation officers to direct that compensation payments be suspended or reduced while a dispute is being resolved. The section (with s.182K and s.182M) effectively replaces the current Part XII.

The new provisions, to be exercised by conciliation officers, essentially replicate the limits of those powers currently available to arbitrators in the existing Part XII, which is repealed.

### **Section 182M - Provisions about directions**

Section 182M outlines matters that are relevant to the manner and form of directions made by conciliation officers as allowed by sections 182K and 182L (the making and suspension of payments).

### **Section 182N - Finalising orders**

Section 182N allows conciliation officers to issue orders by the consent of the parties that will have the effect of finalising a dispute.

### **Section 182O - Conclusion of conciliation and certificate of outcome**

Section 182O sets out the circumstances that will bring the conciliation process to conclusion. It includes agreement between the parties, an assessment by the conciliation officer that no further agreement is likely or when the time limit on conciliation (as defined by the Conciliation Service Rules) has been reached. Conciliation officers are required to produce a certificate of outcome which specifies the outcomes of conciliation.

### **Section 182P - Obtaining information**

Section 182P provides that conciliation officers, like arbitrators, are not bound by the rules of evidence and may use any means to inform themselves as they think fit.

### **Section 182Q - Scope of conciliation**

Section 182Q enables matters not included in an application to be raised and discussed during the conciliation process. Conciliation officers have discretion to limit matters that are raised in this manner with a view to preserving the principles of natural justice and procedural fairness.

### **Section 182R - Conciliation officer may provide information to another party or a medical practitioner**

Section 182R enables a conciliation officer to share documents and information with others who may have a bearing on bringing a dispute to a conciliated outcome. Conciliation officers may place conditions and restrictions around information so provided.

### **Section 182S - Representation**

Section 182S determines the means by which a party may be represented at conciliation and the limitations that apply. Existing representation entitlements are maintained such that parties to a dispute may appear in person or may be represented by legal practitioner; or a registered agent; or if the party is a body corporate, a director, secretary, or other officer of the body corporate; or, if the party is a public sector body, an authorised employee.

### **Section 182T - Litigation guardian**

Section 182T enables a conciliation officer to appoint a litigation guardian for children and other persons under legal disability.

### **Section 182U - Interpreters and assistants**

Section 182U enables a party to conciliation to be assisted by an interpreter. A similar provision exists in the current Act in relation to its application to arbitration and will be retained for that purpose.

### **Section 182V - Alternative means of participation in conciliation**

Section 182V allows conciliation officers to use alternative means for parties to participate in conciliation proceedings. Such means include telephone and video conferences. Conciliation officers are also empowered to take into account a written submission prepared by a legal practitioner or registered agent who represents a party.

### **Section 182W - Conciliation to be in private**

Section 182W requires all conciliation proceedings to be conducted in private unless the conciliation officer decides, or the conciliation rules provide, otherwise.

### **Section 182X - Attendance at meetings and conferences**

Section 182X regulates the giving of notice to parties (and other persons who the conciliation officer may consider beneficial in bringing the dispute to resolution) regarding attendance at conciliation meetings and conferences. Failure of a party to attend does not prevent a meeting or conference from proceeding or directions being made by the conciliation officer for the making or cessation of entitlements.

### **Section 182Y - Privilege against self incrimination**

Section 182Y provides that a person is not excused from answering a question or producing a document on the grounds that it might incriminate a person or render them liable to a penalty.

**Section 182ZA - Legal professional privilege in relation to medical reports**

Section 182ZA provides that a legal practitioner cannot refuse to answer a question or produce a medical report on the basis that it will infringe the principles of legal professional privilege. This does not apply to reports which do not relate directly to the nature of the injury. A legal practitioner is able to submit a report that omits the passages of any report that do not relate to the injury or its treatment or contain any privileged communication.

**Section 182ZB - Other claims of privilege**

Section 182ZB provides a person in a proceeding is not required to answer a question or provide a document, material or information if the person could not be compelled to do the same in the Supreme Court.

**Section 182ZC - Dealing with documents produced**

Section 182ZC empowers a conciliation officer to retain documents or material for a period considered reasonable and make copies of those documents or materials.

**Section 182ZD - Referral of medical dispute for assessment**

Section 182ZD enables conciliation officers to refer a matter for determination by a medical assessment panel. Medical assessment panels provide independent binding decisions on medical questions where there is a conflict of medical opinion.

**Section 182ZE - Terms used**

Section 182ZE is a definition provision that defines a number of the terms used in this subdivision.

**Section 182ZF - When decision or conciliation agreement has effect**

Section 182ZF provides that a decision made by a conciliation officer or an agreement reached at conciliation has effect immediately unless a later time is specified in the decision or agreement.

**Section 182ZG - Correcting mistakes**

Section 182ZG provides that conciliation officers may correct a decision where there was a clerical error, or error from an accidental slip or omission or a material miscalculation involving figures or a description, or a defective form. This ensures matters do not have to be reconvened or directions rewritten due to minor issues or mistakes.

**Section 182ZH - Enforcement of decisions and conciliation agreements**

Section 182ZH enables a person who is owed monies as a result of an agreement or direction to enforce the payment of those monies in a court of competent jurisdiction.

**Section 182ZI - Conciliation decisions not reviewable**

Section 182ZI provides that decisions by a conciliation officer are not subject to appeal. Decisions may be varied or revoked by an arbitrator as part of the arbitration process but there is no avenue of appeal or judicial review against the decision itself.

**Section 182ZJ - Provisions about revoked directions**

Section 182ZJ provides that where a direction of a conciliation officer is revoked by an arbitrator, the obligation to continue to pay compensation ceases but this does not affect the requirement to pay the compensation prior to the revocation. Where a direction by a conciliation officer to suspend or reduce a worker's weekly payments is revoked by an arbitrator, the employer's obligations to make weekly payments are to recommence from the date of the revocation **and** are to be reinstated for the period they were suspended unless the arbitrator orders otherwise.

**Section 182ZK - Recovery of payments**

Section 182ZK determines the status of payments (weekly payments and/or statutory allowances) directed to be made by a conciliation officer but later determined by an arbitrator to not have been payable. Such payments are not to be refunded unless the arbitrator is satisfied that the claim for the compensation was wholly or partly fraudulent or made without proper justification. In these circumstances the arbitrator may order the worker or another person to refund all or part of the compensation previously directed to be paid.

**Section 182ZL - Director may order payment by insurer**

Section 182ZL enables a worker to apply to the Director, Conciliation for an order that an employer's insurer pay amounts outstanding from a direction made by a conciliation officer.

**Section 182ZM - Evidence not admissible in proceedings**

Section 182ZM precludes statements made during the conciliation process from being used in other proceedings related to the claim to which the dispute relates. A conciliation officer cannot be called as a witness in any subsequent proceeding. Relevant proceedings include arbitration and claims for damages (common law).

**Section 182ZN - Payment of compensation**

Section 182ZN ensures that payments agreed or directed to be paid are paid to the appropriate person and are not assignable. In some circumstances payments may be made to WorkCover WA for custody.

**Section 182ZO - Workers' Compensation Arbitration Service Established**

Section 182ZO establishes the Workers' Compensation Arbitration Service. Unlike the current dispute resolution arrangements, the Arbitration Service is independent from the Conciliation Service.



### **Section 182ZP - Registrar**

Section 182ZP describes the legislative responsibilities and functions of the Registrar of the Arbitration Service. The Registrar is the head of the Arbitration Service. The Registrar is not subject to management or direction in respect to a decision or discretion in relation to any particular dispute.

### **Section 182ZQ - Arbitrators**

Section 182ZQ establishes the manner in which the chief executive officer may appoint persons to the role of arbitrator and the terms and conditions of those appointments.

### **Sections 182ZR - Provisions about designations**

Section 182ZR determines the basis on which the Registrar and arbitrators will be formally designated and the circumstances in which designation ceases to have effect.

### **Section 182ZS - Delegation by Registrar**

Section 182ZS enables the Registrar to delegate a power or responsibility to another officer of WorkCover WA or an arbitrator appointed on a sessional basis.

### **Section 182ZT - Application for arbitration**

Section 182ZT enables a party to make application to the Registrar for the resolution of a dispute by arbitration where the dispute has not been resolved by conciliation.

### **Section 182ZU - Acceptance of application**

Section 182ZU determines that an application for arbitration cannot be accepted unless the application is accompanied by a certificate from the Conciliation Service to the effect that matters in dispute are either not suitable for conciliation or the matters dealt with via the conciliation process remain unresolved.

### **Section 182ZV - Registrar to allocate dispute**

Section 182ZV requires the Registrar to allocate a dispute to an arbitrator.

Clause 7

### **Section 185 replaced**

This clause amends the arbitration process established in s.185 to exclude conciliation. Under the existing provisions the arbitrator is required to attempt to resolve a dispute by conciliation. The amendments establish conciliation as a distinct process with arbitrators only engaged in the determination of matters through arbitration.

Clause 8

### **Section 189 amended**

This clause amends the discretion of arbitrators in allowing matters not included in an application or claim to be raised and considered during the arbitration process. Arbitrators have discretion to limit matters that are raised in this manner with a view to preserving the principles of natural justice and procedural fairness.

- Clause 9           **Section 204A inserted**  
This clause (formerly s.177) ensures the confidentiality of communications between workers and WorkCover WA staff in relation to dispute resolution processes. Such communication is not admissible before an arbitrator without the consent of the worker.
- Clause 10          **Section 211 amended**  
This clause amends s.211 to provide authority for an arbitrator to confirm, vary or revoke a direction made by a conciliation officer in relation to the making of or suspension or reduction of weekly payments and the payment of medical and other expenses.
- Clause 11          **Sections 217A and 217B inserted**  
This clause relocates the existing s.186 and s.187 to accommodate the new provisions that relate to conciliation.
- Clause 12          **Part XII deleted**  
The existing Part XII deals with interim and minor orders (making and suspension of payments). These will now be exercised by conciliation officers and the provisions of Part XII are therefore no longer relevant to arbitration.
- Clause 13          **Part XIII heading amended**  
This clause amends the heading of Part XIII, dealing with appeals from decisions of arbitrators, as a consequence of the transfer of the appeal function to the District Court of WA. Currently appeals from decisions of arbitrators are dealt with by a Commissioner (who is a District Court Judge). The bill amends Part XIII to provide for all appeals from decisions of arbitrators to be dealt with by the District Court of WA.
- Clause 14          **Sections 245 and 246 deleted**  
This clause repeals s.245 and s.246 relating to the powers of the Commissioner to deal with appeals from arbitrators under Part XI and the associated obligations of parties and witnesses. As a consequence of the amendments, appeals from arbitrators' decisions will be dealt with by the District Court of WA. Arbitrators will no longer be empowered to refer novel or complex questions of law to a higher jurisdiction. Arbitrators will be required to deal with such questions and in the event of a potential error of law, the arbitrator's decision can be appealed to the District Court of WA in the normal manner.
- Clause 15          **Section 247 amended**  
This clause amends s.247 to establish the authority of the District Court of WA to deal with appeals from the decisions of arbitrators. Appeals may only be lodged if the appeal involves a question of law. Appeals are to be conducted in accordance with the Rules of the District Court of WA.

- Clause 16      **Sections 248 and 249 deleted**  
This clause deletes s.248 and s.249 dealing with issues relating to the conduct of appeals to the Commissioner. As appeals will be dealt with by the District Court of WA (and subject to the District Court Rules), these provisions are no longer required.
- Clause 17      **Section 250 amended**  
This clause makes consequential amendments to s.250 to allow the District Court of WA (rather than the Commissioner) to stay the operation of an arbitrator's decision pending the determination of an application for leave to appeal.
- Clause 18      **Sections 251 to 253 deleted**  
This clause deletes s.251 to s.253 relating to the power of the Commissioner to state a case to the Court of Appeal and the conduct of appeals to and the decisions of the Commissioner. These powers will no longer be relevant due to the conferral of jurisdiction directly to the District Court of WA.
- Clause 19      **Section 254 replaced**  
This clause makes consequential amendments to preserve the right of appeal to the Court of Appeal. The difference will be that the appeal will lie from a decision of the District Court of WA as opposed to the current situation where the right of appeal is from the Commissioner. The appeal processes will be dictated by the Rules of the District Court and the Court of Appeal.
- Clause 20      **Section 267 replaced**  
This clause makes consequential amendments to s.267 to preserve the beneficial application of the awarding of costs against workers in relation to appeals.
- Clause 21      **Part XVII deleted**  
This clause deletes Part XVII of the existing Act, which deals with the establishment of the DRD and the appointment of the Commissioner. As neither the DRD nor the Commissioner will exist under the proposed legislation, the content of Part XVII becomes obsolete and is repealed.
- Clause 22      **Sections 293A and 293B inserted**  
This clause empowers the Minister to make rules that govern the process and procedure of the Conciliation Service (s.293A) and the Arbitration Service (s.293B) by the making of Rules for each service. The Act currently vests such authority in the Commissioner.
- Clause 23      **Section 293 amended**  
This clause makes consequential amendments to the general provisions about Rules to cater for the existence of two sets of Rules (Conciliation and Arbitration) from the current one (DRD), which deals with both conciliation and arbitration.

Clause 24      **Section 294 replaced**  
This clause makes consequential amendments to provisions relating to Practice Notes to enable the Director Conciliation and the Registrar, Arbitration to issue Practice Notes. Under the existing dispute resolution arrangements the Commissioner has responsibility for issuing Practice Notes. Practice Notes relate to the practice of the jurisdiction and may be issued internally and externally to guide parties and officers in the manner in which the business of the respective Services is to be conducted.

## **Division 2 — Consequential and miscellaneous amendments**

Clause 25      **Section 5 amended**  
This clause defines, or redefines, a number of terms that have either been amended under the revised proposed dispute resolution system (e.g. Director) or are new terms (e.g. Conciliation Service).

Clause 26      **Section 67 amended**  
This clause makes allowance for the new s.182N that permits conciliation officers to make finalising orders on matters. A conciliation officer may, with the consent of the parties and upon filing of a memorandum of consent, make orders for the redemption of a claim.

Clause 27      **Section 76 amended**  
This clause makes consequential amendments to provide a mechanism for the Director to refer memorandums of agreement to the Registrar for ultimate decision where there are prima facie concerns over genuineness of the agreement or adequacy of the amount of compensation.  
Under the existing arrangements, such matters are referred to the Commissioner. The amendment empowers the Director to now refer such matters to the Registrar, Arbitration, who will allocate them to an arbitrator for determination.

Clause 28      **Section 91 amended**  
This clause makes a consequential amendment to allow a court to refer an assessment of compensation in certain circumstances to an arbitrator for determination. The clause previously stated that such an application should be dealt with in accordance with the DRD Rules. The DRD Rules are to be replaced with the Conciliation and Rules and the Arbitration Rules.

Clause 29      **Section 93D amended**  
This clause deletes reference in s.93D(9) and (10) as to the specific manner in which disputes that arise under s.93D are to be dealt with. Section 93D provides for the assessment of disability under the 1993 common law scheme. The provisions of s.93D(8) are adequate to guide the parties to the extent that a dispute is deemed to have arisen and then should be dealt with under the dispute resolution provisions.

- Clause 30      **Section 106 amended**  
This clause deletes the reference to the Dispute Resolution Directorate (DRD) in s.106(3), which empowers the General Fund to be used for the specific purpose of funding the DRD. Under the revised dispute resolution arrangements, the Conciliation Service and Arbitration Service will both be divisions of WorkCover WA.
- Clause 31      **Section 144 inserted**  
This clause inserts a new provision defining the term “relevant authority”. As both conciliation officers and arbitrators will have the authority to refer conflicts of medical opinion to a medical assessment panel for determination, the Director, Conciliation and the Registrar, Arbitration will have legislative responsibilities under those provisions. Use of the term “relevant authority” will enable those responsibilities to apply to the respective Services.
- Clause 32      **Section 145A amended**  
This clause amends s.145A to incorporate the legislative authority for conciliation officers to refer a matter to a medical assessment panel (reference to s.182ZD). This clause also corrects two previously undetected drafting anomalies (Schedule 1 clause 18A(2ab) and Schedule 7 clause 6). The power to refer matters under those provisions previously existed but had not been appropriately referenced to s.145A.
- Clause 33      **Section 145B amended**  
This clause reallocates the responsibility for the maintenance of a register of medical practitioners approved to participate on a medical assessment panel from the Director to the chief executive officer.
- Clause 34      **Section 145C amended**  
This clause enables the Director, Conciliation or the Registrar, Arbitration to constitute a medical assessment panel.
- Clause 35      **Section 145D amended**  
This clause amends the reference to the existing Director in s.145D to “relevant authority”. “Relevant authority” by definition means either the Director (in the case of conciliation) or the Registrar (in the case of arbitration). The amendment authorises the Director or Registrar to perform certain tasks under s.145D, dependent upon the stage of the dispute resolution process that the dispute is being dealt with (i.e. the Director at conciliation or the Registrar at arbitration).
- Clause 36      **Section 145E amended**  
This clause amends the reference to the existing Director in s.145E to “relevant authority”. “Relevant authority” by definition means either the Director (in the case of conciliation) or the Registrar (in the case of arbitration). The amendment authorises the Director or Registrar to perform certain tasks under s.145E, dependent upon the stage of the dispute resolution process that the dispute is being dealt with (i.e. the Director at conciliation or the Registrar at arbitration).

- Clause 37      **Section 145F amended**  
This clause amends the reference to the existing Director in s.145F to “relevant authority”. “Relevant authority” by definition means either the Director (in the case of conciliation) or the Registrar (in the case of arbitration). The amendment authorises the Director or Registrar to perform certain tasks under s.145F, dependent upon the stage of the dispute resolution process that the dispute is being dealt with (i.e. the Director at conciliation or the Registrar at arbitration).
- Clause 38      **Section 146F amended**  
This clause reallocates the responsibility for the maintenance of a register of medical practitioners designated as approved medical specialists from the Director to the chief executive officer.
- Clause 39      **Section 146M amended**  
This clause transfers the ability to suspend a worker’s entitlements for failing to comply with a requirement of, or otherwise obstructing, an approved medical specialist panel from an arbitrator to the Registrar.
- Clause 40      **Section 146S amended**  
This clause reallocates the current requirement for the Director to maintain a register of persons who are willing to be selected for a specialised retraining assessment panel to the chief executive officer.
- Clause 41      **Section 176 amended**  
This clause is a consequential amendment that deletes the reference to Part XII, which is repealed under this Bill.
- Clause 42      **Section 180 amended**  
This clause makes consequential changes to replace the reference to the DRD Rules (which are to be repealed) with the Conciliation Rules or the Arbitration Rules (or relevant rules, depending upon the phase of dispute resolution) in relation to the provision of certain documentation.
- Clause 43      **Section 182 amended**  
This clause is a consequential amendment of establishing the Arbitration Service (and Registrar as its head). The amendment transfers to the Registrar the ability to direct the applicant to provide copies of an application for arbitration to other parties.
- Clause 44      **Section 183 amended**  
This clause is a consequential amendment to replace the reference to the DRD Rules with the new Arbitration Rules in determining the lodging and service of documents and the provision of information within the timeframes defined by those Rules.

- Clause 45      **Section 184 deleted**  
This clause deletes a provision dealing with interim assessments and minor claims. Under the proposed amendments, such matters will be dealt with under a different scheme that will see conciliation officers exercise such powers. Part XII dealing with interim directions and minor claims is repealed.
- Clause 46      **Sections 186 and 187 deleted**  
This clause repeals s.186 and s.187 of the existing Act dealing with the review of decisions of arbitrators. These sections have been relocated as s.217A and s.217B.
- Clause 47      **Part XI Division 4 heading replaced**  
This clause facilitates drafting re-structuring required to accommodate the revised provisions.
- Clause 48      **Section 193 amended**  
This clause replaces the term “dispute resolution authority” with “Registrar or arbitrator” in respect to the power to request the production of documents and the implications of not producing them as they relate to the Arbitration Service.
- Clause 49      **Section 194 amended**  
This clause facilitates drafting re-structuring required to accommodate the revised provisions.
- Clause 50      **Section 195 amended**  
This clause clarifies the definition of legal practitioners who have been involuntarily removed from the roll of practitioners. Under both the existing and proposed provisions, such persons are prohibited from representing parties before a dispute resolution authority.
- Clause 51      **Section 196 replaced**  
This clause amends s.196 relating to litigation guardians to add an authority for an arbitrator to adjourn or defer a proceeding until a litigation guardian is appointed to a person under legal disability otherwise than being a child. The power to appoint a litigation guardian to a child who is a party to proceedings already exists and is retained.
- Clause 52      **Section 198 amended**  
This clause removes references to conferences and conferencing by arbitrators. Under the proposed arrangements, arbitrators will have a purely determinative function and conferencing will not be required.
- Clause 53      **Section 199 amended**  
This clause removes references to conferences and conferencing by arbitrators. Under the proposed arrangements, arbitrators will have a purely determinative function and conferencing will not be required.

- Clause 54      **Section 204 amended**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 55      **Section 205 amended**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 56      **Part XI Division 5 heading replaced**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 57      **Part XI Division 5 Subdivision 1 heading deleted**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 58      **Part XI Division 5 Subdivision 2 heading deleted**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 59      **Section 218 amended**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 60      **Part XI Division 5 Subdivision 3 heading deleted**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 61      **Part XI Division 6 heading replaced**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.
- Clause 62      **Section 255 amended**  
This clause amends offence provisions dealing with failure to comply with decisions of a dispute resolution authority. These amendments have the effect of broadening those provisions to include the amended dispute resolution provisions. Section 255(2A) is to be extended to include failing to comply with a direction of a conciliation officer.
- Clause 63      **Section 256 replaced**  
This clause amends s.256 to include failing to comply with a requirement of a conciliation officer to attend a meeting or conciliation conference as an offence provision.
- Clause 64      **Section 257 amended**  
This clause replaces the term “dispute resolution authority” with “Registrar or arbitrator” as required in respect to the offence of failing to give evidence in an arbitration proceeding. The section retains the current offence provisions but because of the amendment to the definition of “dispute resolution authority”, this amendment is required to give the provision context to the arbitration process.



- Clause 65      **Section 259 amended**  
This clause amends s.259 to include a meeting with a conciliation officer and a conciliation conference within the definition of “**hearing**”. This will bring misbehaviour in these proceedings within the scope of the offence or potential offence provisions.
- Clause 66      **Section 260 deleted**  
This clause removes “Contempt of Commissioner” as an offence as the position of Commissioner will no longer exist under the Act. Contempt matters will be dealt with in accordance with the Rules of the District Court of WA.
- Clause 67      **Section 268 amended**  
This clause allows conciliation officers to assess costs that are to be awarded under the dispute resolution process. The current provisions give such powers to arbitrators and this amendment extends that power to include conciliation officers who will be involved in this process.
- Clause 68      **Section 292 amended**  
This clause makes consequential amendments to replace references to the ability to make regulations regulating the operations of the current DRD to apply to the proposed Conciliation and Arbitration Services.
- Clause 69      **Section 299 amended**  
This clause makes consequential amendments to reflect the change from the Dispute Resolution Directorate to the new Conciliation and Arbitration Services.
- Clause 70      **Section 304 amended**  
This clause extends the protection from liability to include persons engaged as conciliation officers or as arbitrators. The reference to the Commissioner is removed as a consequential amendment.
- Clause 71      **Section 305 amended**  
This clause extends the existing protection and immunity to include conciliation officers. The reference to the Commissioner is removed as a consequential amendment.
- Clause 72      **Section 325 inserted**  
This clause establishes the authority for transitional provisions to allow matters underway within the current dispute resolution arrangements to transition to the new arrangements. The transitional processes are contained within the proposed new Schedule 8 of the Act. Subsection (3) creates the authority for the establishment of appropriate regulations to deal with transitional situations, which the provisions of Schedule 8 have not contemplated or adequately addressed.
- Clause 73      **Schedule 7 amended**  
This clause amends Schedule 7 to explicitly allow a conciliation officer or an arbitrator to refer a noise-induced hearing loss dispute to a medical assessment panel.

Clause 74      **Schedule 8 replaced**  
This clause inserts transitional provisions as Schedule 8. This requires the repeal of the previous transitional provisions and the insertion of those designed to efficiently transition matters into the new dispute resolution model. This includes matters that are yet to be conciliated, those awaiting arbitration and those on which a determination has been made and are subject to appeal proceedings.

Clause 75      **Various references to “Director” amended**  
This clause replaces the various applicable references to Director within the Act and replaces that with Registrar, where those responsibilities are to be exercised by the Registrar, Arbitration.

Clause 76      **Various references to “DRD Rules” amended**  
This clause replaces the various references to the DRD Rules with the Arbitration Rules in the appropriate and required areas.

**Division 3 — *Workers’ Compensation (DRD) Rules 2005* repealed**

Clause 77      **DRD Rules repealed**  
This clause repeals the DRD Rules which are to be replaced by the Conciliation Rules and the Arbitration Rules, to regulate the practices and procedures of the respective services.

**PART 3 — OTHER AMENDMENTS**

**Division 1 — Amendments**

Clause 78      **Long title amended**  
This clause facilitates drafting re-structuring required to accommodate revised provisions.

Clause 79      **Section 3 amended**  
The *Workers’ Compensation and Injury Management Act 1981* does not currently define the “workers’ compensation scheme” although it is widely referred to. These amendments clearly define the workers’ compensation scheme. The amendments do not seek to change or redefine the scope of the workers’ compensation scheme as it is generally understood.

- Clause 80      **Section 5 amended**  
This clause enables references to State and Commonwealth industrial relations legislation contained in the Act to be maintained without the need for legislative amendment.  
**relevant employment**  
Following the gazettal of pleural plaques (diffuse pleural fibrosis) as a specified occupational disease under Schedule 3 (Specified industrial diseases), this amendment formally includes pleural plaques and lung cancer in the definition of relevant employment. This brings these conditions into the definition on the same terms as other asbestos - related diseases currently outlined in the definition.  
**worker**  
This amendment will enable all workers to be covered by employee indemnity policies regardless of residential arrangements or any family or other relationship to the employer.
- Clause 81      **Section 10A amended**  
This amendment specifically excludes working directors from the common law safety net provisions (see clauses 113 to 118).
- Clause 82      **Section 24A amended**  
These amendments give effect to the removal of age limitations on entitlements for compensation for noise-induced hearing loss. These amendments relate specifically to the pre-2005 noise induced hearing loss regime. The removal of age-based discrimination for noise-induced hearing loss is not retrospective. Hearing loss incurred after a worker has turned 65 and before the commencement of the amendments will not be compensable.
- Clause 83      **Section 31E amended**  
These amendments give effect to the removal of age limitations on entitlements for compensation for noise-induced hearing loss. These amendments relate specifically to the post-2005 noise-induced hearing loss regime. The removal of age-based discrimination for noise-induced hearing loss is not retrospective. Hearing loss incurred after a worker has turned 65 and before the commencement of the amendments will not be compensable.
- Clause 84      **Section 32 amended**  
Following the gazettal of pleural plaques (diffuse pleural fibrosis) as a specified occupational disease under Schedule 3 (Specified industrial diseases), this amendment formally specifies pleural plaques (diffuse pleural fibrosis) in section 32 consistent with other specified asbestos-related diseases outlined in this section.
- Clause 85      **Section 33 amended**  
Following the gazettal of pleural plaques (diffuse pleural fibrosis) as a specified occupational disease under Schedule 3 (Specified industrial diseases), this amendment formally specifies pleural plaques (diffuse pleural fibrosis) in section 33 consistent with other specified asbestos related diseases outlined in this section.

- Clause 86            **Section 38 amended**  
 Following the gazettal of pleural plaques (diffuse pleural fibrosis) as a specified occupational disease under Schedule 3 (Specified industrial diseases), this amendment includes pleural plaques (diffuse pleural fibrosis) in section 38 enabling questions about the disease to be determined by a medical panel as is currently the case for other asbestos-related diseases outlined in this section.
- Clause 87            **Section 41 amended**  
 Following the gazettal of pleural plaques (diffuse pleural fibrosis) as a specified occupational disease under Schedule 3 (Specified industrial diseases), this amendment includes pleural plaques (diffuse pleural fibrosis) in section 41. This is consistent with other asbestos-related diseases currently outlined in this section.
- Clause 88            **Section 56 amended**  
 This clause removes age limits on entitlements as from the commencement date. The provisions will not operate retrospectively. The abolition of the age limitation will operate for injuries that occur after the date of proclamation of the amendment.
- Clause 89            **Section 57 amended**  
 This is a consequential amendment created by the primary amendment to Schedule 1 Clause 18A that is the subject of Clause 123(13) of the Bill. The effect of s.57 is in respect to a worker whose access to weekly payments ceases on account of age. It preserves other rights the worker has under the Act.
- Clause 90            **Section 57A amended**  
 This clause makes grammatical changes to s.57A(1) to express the terms of the section in more succinct language. The effect of the provision does not change.  
 The clause also amends s.57A(2) to extend the period from 3 to 5 days within which an employer is required to claim on their workers' compensation indemnity insurer. It correspondingly allows the insurer to seek to recover from the employer payments made in respect to the first 5 days of the claim where the employer fails to comply with these obligations. Clause 90(2) inserts a penalty of \$1,000 for employers who fail to comply with these obligations.  
 Clause 90(4) provides greater certainty as to when a worker can expect to be paid weekly payments. The phrase "as soon as practicable" did not establish sufficient clarity.  
 Clauses 90(4)(c) and (d) provide the second proposed amendment to s.57A(7)(B) by deleting the reference to the requirements of s.178 and s.179 as an arbitrator has a right to make orders in the event that they find there is reasonable cause for not having met those obligations (s.178(1)(c) and (d)).  
 Clause 90(5) inserts subsection (8A) to add a penalty of \$2,000 for employers who fail to make a weekly payment of compensation on the due date.

- Clause 91      **Section 57B amended**  
This clause adds a penalty of \$2,000 for self insured employers who fail to make weekly payments of compensation on the due date (this is consistent with a similar penalty for insured employers).
- Clause 92      **Section 58 amended**  
This clause is a consequential amendment that arises from the amendment to s.57A(2) to increase the number of days from 3 to 5 by which an employer is required to lodge a claim received from a worker with the insurer.
- Clause 93      **Section 67 amended**  
This clause serves to provide clarity as to the date on which a worker's entitlements cease when an order is made or they enter into an agreement to redeem their claim under the provisions of s.67.  
Clause 93 (2) inserts a new s.67(7) which provides that payments required to be paid under a redemption agreement must be paid within 14 days of the registration of the agreement.
- Clause 94      **Section 71 amended**  
This clause clarifies the circumstances under which recovery of payments of compensation or expenses can be made where payments have been made in accordance with an order of an arbitrator. The amendments provide workers are not liable to refund compensation paid under an order of an arbitrator unless the claim for payment was fraudulent or made without proper justification.
- Clause 95      **Section 83 amended**  
This clause enables State and Commonwealth industrial relations legislation to be maintained without the need for legislative amendment.
- Clause 96      **Section 93K amended**  
This clause abolishes the period of 30 days that a worker has to commence court proceedings after the Director gives to a worker notice of the registration of the worker's election to pursue common law damages. The only limit that will now apply to the commencement of common law proceedings is that stipulated by the *Limitations Act 2005*.
- Clause 97      **Section 100 replaced**  
This clause redefines more precisely the functions of WorkCover WA. It encapsulates more succinctly the functions that are relevant to defining the agency's role in the overall workers' compensation scheme. The revised list of functions more accurately reflects stakeholder and public expectations of WorkCover WA. The amendment does not seek to extend or materially change the role and functions of the agency.
- Clause 98      **Section 101 amended**  
This clause gives WorkCover WA power to effect contracts of insurance that would provide indemnity for claims against the General Account made by injured workers employed by uninsured employers.

- Clause 99           **Section 106 amended**  
This clause allows WorkCover WA to utilise funds from the General Account to effect contracts of insurance that would provide indemnity for claims against the General Account made by injured workers employed by uninsured employers. It also allows payments resulting from claims on such a policy to be credited to the General Account.
- Clause 100       **Section 146H amended**  
This clause will enable a valid certificate of degree of impairment to be used for any of the purposes of the Act.  
Under the current arrangements a separate certificate of degree of impairment must be obtained for each specific purpose.
- Clause 101       **Section 151 amended**  
This clause adds lung cancer and pleural plaques (diffuse pleural fibrosis) into the range of diseases for which WorkCover WA may fix an additional premium. Pleural plaques (diffuse pleural fibrosis) is a new addition to the asbestos-related diseases covered by the Act. Lung cancer has been included in the Act for some time but has not previously been included in this section due to oversight.
- Clause 102       **Section 155E inserted**  
This clause is a consequential amendment as a result of the deletion of the notification requirements in s.157A(1), (2) and (3). The former s.157A (4), relating to return to work programs, has been inserted as a new s.155E.
- Clause 103       **Section 157A deleted**  
This clause deletes the notification requirements of s.157A relating to return to work. All insurers and self-insurers have obtained exemptions under s.157A(3) from the requirement to notify. These exemptions are based on the implementation of WorkCover WA monitoring and notification systems, which automatically identify claims with durations of four weeks or more.
- Clause 104       **Section 159 inserted**  
This clause provides a range of new definitions that are applicable in the amended Part X of the Act which deals with insurance matters.
- Clause 105       **Section 160 amended**  
Section 160 is amended to require employers to obtain a policy of insurance against their liability to pay damages to any worker employed by them. The making of such insurance requirement compulsory is fundamental to the creation of the common law safety net.
- Clause 106       **Section 161A amended**  
This clause amends section 161A to include damages for compensable injuries within the scope of policies which can only be issued by an approved incorporated insurance office..
- Clause 107       **Section 164 amended**  
This clause amends section 164 to include damages for certain industrial diseases as a liability which is not covered by the exemption granted to exempt employers (self insurers).

- Clause 108      **Section 165 amended**  
This clause amends section 165 to include liability for damages in respect to compensable injuries as a matter to be considered in the annual review of an exempt employer.
- Clause 109      **Section 168 amended**  
This clause amends section 168 to include actions for damages as a matter to be considered where an exempt employer seeks to revoke that exemption.
- Clause 110      **Section 171 amended**  
This clause is a consequential amendment to section 171 relating to the provision of information by approved insurance offices.
- Clause 111      **Section 172 amended**  
This clause aligns the definition of remuneration to other amendments in this Part. It relates to WorkCover WA's ability to provide information to insurers and to recover premium in appropriate circumstances.
- Clause 112      **Section 173 amended**  
This amendment clarifies a workers' rights against an insurer and provides a remedy for all circumstances where an insured employer is unable or otherwise fails to respond to a claim from an injured worker, including circumstances where liability has not yet been determined.
- Clause 113      **Section 174 amended**  
This clause amends section 174 to establish the common law safety net arrangements. These changes will provide workers having an entitlement to common law damages to recover those from the WorkCover WA administered General Account where their employer is not insured against that liability and is otherwise unable to pay.
- Clause 114      **Section 174AAA inserted**  
This clause creates ability for WorkCover WA to seek to have judgments for damages set aside by application to the Supreme Court in circumstances where an employer has not acted in their own best interests and inappropriately placed the General Account at risk or increased exposure.
- Clause 115      **Section 174AB amended**  
This clause provides the authority for WorkCover WA to exercise all the rights of the employer in claims for statutory compensation and damages actions where the employer is uninsured.

- Clause 116 **Section 174AC replaced**  
This clause creates the authority for WorkCover WA to be indemnified for amounts paid from the General Account to a worker by an insurer (of the employer where one exists) and to recover from another party who may be liable or partially liable in respect to compensation under the Act and damages.
- Section 174AD – Employer’s duty to assist WorkCover WA**  
This provision places an obligation to assist WorkCover WA where requested to do so in the provision of information and other assistance and the provision and execution of documents. This requirement exists to enable WorkCover WA to properly assess a claim and where appropriate defend and manage it.  
A penalty is attached to the section for those employers who fail to do so.
- Clause 117 **Section 174A amended**  
This clause extends the existing principle of limiting an insurer’s ability to refuse to indemnify an employer to situations relating to actions for damages.
- Clause 118 **Section 175 amended**  
This clause is a consequential amendment to the creation of the common law safety net.
- Clause 119 **Section 175A amended**  
This amendment enables the chief executive officer of WorkCover WA rather than the Chairman of the WorkCover WA Board to authorise persons as inspectors under the Act. Currently the Act requires the Chairman of WorkCover WA’s governing Board to authorise persons as inspectors under the Act. This is an administrative function that is more efficiently performed by the chief executive officer of WorkCover WA.
- Clause 120 **Section 178 amended**  
s.178(1) provides a ‘safety net’ for employees who fail to make a claim within the time limit of 12 months from the occurrence of the injury. Under these provisions, a claim can still be made if an employee can show that the employer would not be prejudiced in defending the claim. However, the courts have interpreted that the worker only has to account for prejudice to the employer for the first 12 months of any period during which a claim was not made regardless of the actual length of this period.  
This amendment corrects the anomaly outlined above and in determining prejudice to the employer requires the worker to account for the whole period of failure to lodge the claim and not just for the first 12 months.
- Clause 121 **Section 270A inserted**  
This clause inserts a provision to enable remuneration of members of the Costs Committee. Advice received highlights that current provisions relating to remuneration of Advisory Committees at s.100A (4) of the Act precludes remuneration of Cost Committee members.



Clause 122      **Section 277 amended**  
This amendment updates a reference to legislation that is no longer current and enables regulations to prescribe other laws in regulations.

Clause 123      **Schedule 1 amended**  
Clause 123(1) is a consequential amendment created by the primary amendment to Schedule 1 Clause 18A that is the subject of Clause 123(13).

Clauses 123(2) to (7) deletes amounts (Amounts A and D) defined in Clause 11 of Schedule 1 related to the calculation of weekly compensation payments. Weekly compensation payments will now be based on average weekly earnings in the 12 months prior to the injury (Amount B). The minimum amount of weekly compensation payments for worker workers (Amount Aa) is maintained.

This clause also makes amendments to clarify entitlements in relation to travel expenses and the status of voluntary payments.

Clause 124      **Schedule 3 amended**  
This clause incorporates the asbestos related condition pleural plaques (diffuse pleural fibrosis) into Schedule 3 of the Act in the same terms as the *Workers' Compensation and Injury Management (Specified Industrial Diseases) Order 2008* made under s.45.

**Division 2 — *Workers' Compensation and Injury Management (Specified Industrial Diseases) Order 2008* revoked**

Clause 125      **Specified Industrial Diseases Order revoked**  
This clause is a consequence of the incorporation of the asbestos related condition pleural plaques (diffuse pleural fibrosis) into Schedule 3 of the Act.