Dear Mr White

LEGISLATIVE REVIEW OF THE WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981

Thank you for your letter of 27 September 2013 inviting comment on the discussion paper relating to the legislative review of the Workers' Compensation and Injury Management Act 1981 (the Act).

Your letter drew attention to several proposals to either repeal or amend sections of the Act which referred directly to the Mines Safety and Inspection Act 1994, or otherwise impacted directly on the mining industry.

This Department acknowledges that the current provisions in the Act which relate to tributers and disentitlement of certain mine workers to compensation are obsolete, enabling the relevant sections of the Act to be repealed.

The remaining proposed changes to the Act outlined in your letter do not directly impact on the administration of the Mines Safety and Inspection Act and the Department has no comment on these proposed changes.

Yours sincerely

DIRECTOR GENERAL

[Handwritten note]

Noted
24/12/13
Dear Mr Gillingham

LEGISLATIVE AMENDMENT AND REVIEW, WORKERS COMPENSATION AND INJURY MANAGEMENT

Thank you for the opportunity to respond to the Review of the Workers Compensation and Injury Management Act 1981 - Discussion Paper. Overall, the Department of Mines and Petroleum (DMP) is supportive of the proposed changes and amendments to the workers compensation and injury management legislation.

However, there is one area of the proposed changes that may be of concern to DMP as it does have the potential to result in long term claims that are problematic to finalise.

- Compensation for permanent impairment (P: 41 & P: 42). That is the proposal for a lump sum payment to be made on assessment of permanent impairment and this settlement sum not impacting on weekly payments or other claimed expenses. The proposal states that the injured worker can also claim common law damages as well as weekly payments/expenses and the settlement sum.

  This has the potential to cost the Department significant monies in the event of an injured worker being assessed with a permanent impairment and that worker being able to continue to claim compensation. This raises questions about whether the proposal could result in claims that are ongoing and difficult to resolve and that require significant input in terms of claims management.

For the rest of the discussion paper, DMP are of the opinion that the overall proposed structure and content of the legislation to replace the Workers Compensation and Injury Management Act 1981, is a great improvement. The proposed legislation is in a more logical order, contains clarifications of various points, new definitions, administrative improvements and some simplifications, making the whole workers compensation and injury management process more...
understandable, less confusing, less time consuming and easier to use for DMP and injured staff alike.

In particular:
- Proposed changes to the Medical Certificates and Form 2B are all positive and will be beneficial to the administration of workers compensation and injury management for DMP.
- Proposed changes to the process for pending claims, although putting more responsibility with the worker, by requiring the insurer to provide fortnightly progress letters to the employee, will be helpful in these cases (P: 26 - P: 28).
- The introduction of a new minor claim pathway will be beneficial to the DMP Corporate Occupational Safety and Health (COSH) team and will reduce the amount of time taken to service minor injury claims (P: 29).
- The proposal for simplifying the method of calculating weekly payments by basing the calculation for award and non-award workers on pre-injury earnings will speed up the process for Employee Benefits and the COSH team (P: 37 - P: 39).
- DMP supports the proposed changes to the noise induced hearing loss (NIHL) testing, claiming and dispute process (P: 43 - P: 53).
- Discontinuation of the Code of Practice (Injury Management) and subsequent reliance on published Guidelines is similarly approved of and supported by DMP (P: 96).
- Abolition of termination day is supported, as historically, this has caused much confusion for injured workers (P: 172).

Yours sincerely

[Signature]

DIRECTOR GENERAL

7 February 2014

1. It is suggested that the terminology be aligned with that in the International Standards Organisation standard on this subject area, ISO 1999-2013, where “noise-induced” is hyphenated—i.e., replace “noise-induced hearing loss” with “noise-induced hearing loss” wherever it occurs.

2. It will also be necessary to use precise terminology for the criteria for entitlement to compensation. For example, the last sentence in clause 281 of the discussion paper says “When a subsequent air conduction test shows a hearing loss of 10% or more a potential claim arises.” This should technically read “When a subsequent air conduction test shows a percentage loss of hearing (PLH) 10% or more greater than the PLH at the baseline test, a potential claim arises.”

This may sound pedantic but it is my understanding that in the other states of Australia workers are eligible for compensation when the PLH equals or exceeds a particular threshold PLH without any adjustment for a baseline level, so this distinction in the WA scheme needs to be made clear if indeed it is intended to carry it on.

3. Clause 275 of the discussion paper says “No changes are proposed to the ... thresholds for entitlement.” This is a little surprising to me as there have been discussions over the years about reducing the “10% PLH more than baseline” to something smaller, to better reflect the difficulties that people with acquired hearing loss have in day-to-day situations. The PLH scale was developed by the Australian National Acoustics Laboratories in the 1980s with the zero on the scale set to indicate when people would be expected to start having problems with daily listening tasks. So anything more than zero indicates that there are likely to be problems. Audiologists have told me that at a 5% PLH the problems are such that it is appropriate for the person to consider using a hearing aid. A 10% PLH is really quite a large amount of hearing loss. Other Australian jurisdictions have a range of entitlement thresholds, between a PLH of 5% and 10%, and I note that the present 2010 WA Guide for the Evaluation of Permanent Impairment has an entitlement threshold of 6% PLH for sudden hearing loss caused by head injury or explosion. Is there any move nationally to “harmonise” these entitlement thresholds? It would also be good to take the opportunity to clarify whether there is an entitlement to compensation for gradual hearing loss caused by workplace chemicals and for noise- or chemical-induced tinnitus.

4. In Clause 284 proposes (P:43) that WorkCover WA no longer approves audiometers or audiometric test booths. Whilst it is appreciated that this will save on WorkCover resources, it may be necessary to instigate a random audit process to ensure that the necessary standards are being adhered to.

5. Clause 287 proposes (P:44) that the baseline and subsequent audiometric testing must be undertaken where a worker is required, or should be required, by the employer to use personal hearing protection equipment. It is unclear what “should be required” means. Does this refer to obligations under OSH/WHS legislation? If so, this will still require a formal assessment of noise exposure levels. It will mean that baseline and subsequent audiometric tests are required at a lower $L_{total}$ value than at present (85 dB(A) rather than 90 dB(A)). However it will be less confusing for employers and workers not having two different criteria in the compensation and OSH/WHS legislation. Proposal P:45 empowering WorkCover WA to deem a workplace as one where audiometric testing must occur is a good idea to overcome the problems there have been in deciding representativeness of measured exposures in some workplaces.
6. Clause 294 proposal P:48 where a 10% or more PLH greater than at baseline is deemed prima facie evidence of NIHL presumably means that in the majority of cases the worker will not be retested by an audiologist nor assessed by an ENT. Does this also apply to the baseline tests (i.e. no more referral for full audiological tests if the Waugh and Macae criteria are met)? Whilst this will certainly streamline testing and compensation cases it may lead to fewer workers with a potentially treatable conductive hearing loss being detected and (privately) referred to appropriate specialists, resulting in more workers in the workplace with hearing difficulties.

7. Clause 305 proposes (P:53) that the last liable employer can only seek contributions from other liable employers up to 5 years before the claim, rather than from any liable employer since the baseline test. This is not a particularly fair apportionment as NIHL does not occur in a linear fashion. Table G2 of AS/NZS 1269.4:2005 shows that in a group of male workers exposed to an L_{Aeq,8hr} of 100 dB(A), a 10% PLH due to noise could be expected to accumulate after 25 years. Of this 10% half (5%) would be acquired in the first 5 years and only one tenth (1%) in the last 5 years. So allowing apportionment among earlier employers would be fairer. Also it is not clear from the discussion paper whether interim subsequent audiograms, particularly those taken at the end and start of various periods of employment, can be taken into account in the apportionment process.

Snr Scientific Officer Noise
WorkSafe Division
Department of Commerce
PO Box 294, West Perth, WA 6872

2 January 2014
Dear Mr Gillingham

The Department of Education (the Department) seeks to make the following submission on possible amendments to the *Workers' Compensation and Rehabilitation Act 1981* (the Act). The following observations reflect practical problems and other difficulties experienced by staff of the Department in effectively managing worker's compensation claims and the rehabilitation of injured employees.

As background the Department employs approximately 40,000 staff located at nearly 800 locations across Western Australia. As such the Department is the single largest employer in Western Australia. Its workforce comprises teachers and administrators; school psychologists; public servants and government officers; education assistants, school cleaners and gardeners.

The management of workers' compensation claims and the rehabilitation of all injured employees rest with the Department's Employee Support Bureau (ESB) which is part of the Workforce Division. ESB currently has an establishment of approximately 30 FTE.

The Department also has a contracted occupational physician who is involved in the management of injured employees not the subject of a compensable injury.

**SUGGESTED AMENDMENTS TO THE ACT**

It is requested that in considering possible amendments to the Act that the following issues be examined:

- Under section 5 with regards to the definition of "Injury" and in particular "stress" that the definition be expanded to include any matter where a worker is subject by their employer of a performance management process or under investigation in regards to disciplinary matter. This would preclude an employee from lodging a claim whilst undergoing these processes so long as the employer's actions were not deemed to be unreasonable or harsh.

  The Department has regular experiences of various unions advising their members to lodge a claim in order to frustrate these processes. It is also aware that employees manipulate the Act in order to have these processes delayed.

- Section 19 to be clarified as to the meaning of "attendance" to state what is actually meant by this term i.e. Is it when a worker signs on for work, enters the entrance or foyer of their workplace etc. This could also be expanded upon in section 19 (2) with regards to "journey" and when the worker's journey begins and ends.

- Section 61 does not provide for the cessation of weekly payments by the employer if a progress medical certificate is not produced stating a worker is totally or partially
Section 61 does not provide for the cessation of weekly payments by the employer if a progress medical certificate is not produced stating a worker is totally or partially incapacitated for work. This can only be done by the employer applying to have the weekly payments cancelled and providing evidence that the worker is fit for duties.

Where the worker does not submit a progress medical certificate on a regular basis then employers often do not know the status of the worker and whether they are fit or otherwise. There is also the risk that a worker can submit a medical certificate indicating they are unfit and remain on weekly compensation payments indefinitely particularly where the worker does not wish to be contacted or deliberately avoids being contactable. The Department has practical experience of this scenario occurring.

Accordingly it is recommended that the Act be amended so weekly payments can be ceased if progress medical certificates showing continuity of unfitness are not regularly forwarded to the employer. Consideration ought to be given to some arrangements in order to prevent employers acting unilaterally or unreasonably prior to ceasing weekly compensation payments. An employer would need to demonstrate it has taken all reasonable steps in attempting to obtain evidence from the worker and the worker has failed to produce the necessary medical certificate(s).

Section 72A should be amended to allow employers to cease weekly compensation payments where a worker fails to attend medical examination without good reason and the employer can show it has endeavoured to accommodate the worker’s request. Currently only WorkCover has the authority to cease weekly compensation payments. This is a very time consuming and costly exercise and from the Department’s experience can take up to 6 months from the time a medical review is sought until the time an Arbitrator might hear a matter of this kind.

The Department’s operations are unique to other employers in that schools being the primary work location are closed for school vacations throughout the year. Teaching staff (principals and teachers) for obvious reasons are not required to attend work during school vacation periods. This cohort of employees have not traditionally had a period of annual leave described in their Industrial awards or agreements as by “custom and practice” this was considered to form part of the school vacation period.

GENERAL COMMENTS

MEDICAL EVIDENCE REQUIREMENTS
The Department supports the need for further responsibility to be placed on an injured worker to provide regular updated medical evidence. There should also be an onus on the worker’s medical practitioner to provide reasonable evidence and clarification of the employee’s capacity for work including the expected length of incapacity. Further education of treating medical practitioners is required as some certify workers as being unfit for extended periods, particularly in relation to mental health issues. Limits should therefore be set regarding the maximum period of time that a person can be certified as unfit for work. After the expiration of that period new medical evidence should be provided to allow the period to be extended.
There should also be a simplified process for reviewing a worker's medical condition where there is specialist information indicating that the worker has a capacity for work however the worker's general practitioner continues to certify them as unfit. Conflicting medical evidence of this kind leads to unnecessary delays in effectively managing workers suffering from compensable injuries.

CASE MANAGEMENT OF INJURED WORKERS
The Department also supports the need for mandatory participation in case conferences for injured workers by the employer or their authorised agent including for example a workplace rehabilitation provider. The need for treating medical practitioners to participate in case conferences when required should also be clearly set out in the Act.

The process for resolving situations where a worker chooses not to participate in a return to work program requires review. Currently it can take months for a case to be heard by an arbitrator during which time the worker continues to receive compensation payments. Again these delays result in additional costs being incurred by the workers' compensation system.

Should you have any queries concerning the above please contact [Redacted]

Yours sincerely

[Redacted]

EXECUTIVE DIRECTOR
WORKFORCE
- 4 FEB 2014
Dear Mr White

LEGISLATIVE REVIEW 2013


Both the Discussion Paper and your letter inviting submissions regarding the review proposals were forwarded extensively throughout the Department. There have been no concerns raised nor have there been any significant comments made regarding the proposed amendments.

We thank you for the opportunity to provide feedback.

Yours sincerely,

A/DIRECTOR GENERAL

14 January 2014
Dear Mr White

LEGISLATIVE REVIEW 2013


Whilst I confirm the Discussion Paper and your letter inviting submissions regarding the review proposals were forwarded extensively throughout the Department, I advise that there have been a number of late submissions received since the date of my last correspondence, which provide considerable feedback on your proposals.

Broadly, the Department is supportive of the proposed changes to the Workers’ Compensation legislation intended to improve the structure of the Act and to simplify and modernise the language and drafting convention used. We are in agreement with most of the recommendations made in the discussion paper but wish to make specific comment on the following proposed changes.

Our comments are as follows:-

1. Referring to proposal 17, Definition of Compensation, it is noteworthy that at paragraph 176, no changes are proposed to the existing liability of employers. The definition of injury within Section 6 of the Act limits the exclusion of disease caused by stress to matters contained in Section 6 (4) of the Act (e.g. discipline). It is submitted that the matters included in Section 5 (4) of the Act, should specifically include injuries that arise wholly or predominantly from a decision by the employer in relation to substandard performance.

2. In proposal 20, section 57 of the Act should provide for a claim lodgement process that is uniform and efficient. The notion of uniform lodgement documentation and requirements is supported: for all claims (e.g. time lost, no
time lost); and for all employers (e.g. insured and self-insured employers); and including public authorities.

3. We refer to page 21 of the Discussion Paper, Medical Certificates. We strongly oppose the proposal to enable classes of persons other than medical practitioners to issue workers' compensation certificates in prescribed circumstances. The extensive and comprehensive training provided to medical practitioners equips them with the knowledge and skills required to accurately diagnose and effectively manage the treatment of work related injuries and medical conditions. It is considered that medical practitioners are also better able to understand the mechanism of injury involved and thereby determine if there is a causal relationship to the injured worker's employment. Nurse practitioners and allied health service providers undertake more specialised training which limits their diagnostic skills and ability to clinically manage medical conditions. Incorrect diagnosis and failure to initiate appropriate treatment will result in more severe injuries, protracted recovery and poorer return to work outcomes. This in turn will increase the cost of workers' compensation claims.

Having different professions issuing workers' compensation certificates is likely to lead to confusion and conflicting advice. It is important that there be clarity about which profession is in charge of clinical care. Effective injury management requires a primary carer to coordinate the clinical management of the worker and medical practitioners are the best placed to deliver the holistic care required.

If the Act is amended to include nurse practitioners, then the corresponding regulations should state that other approved classes of persons such as chiropractors or physiotherapists are unable to certify incapacity for work.

4. Referring to proposals 22 and 23, Consent Authority, we strongly support the introduction of a mandatory and irrevocable consent authority extending to all relevant medical and other information sources. This will improve timeliness in decision making on claims where further information is required and potentially reduce the severity of injuries where delays in determining liability prevent the commencement of injury management and workplace rehabilitation.

WorkCover may wish to consider that personal information should only be released where the insurer's access to the worker's medical history is expressly limited by relevance.

5. At proposal 24, the notion of introducing a generic process based upon a 'claim for compensation' is supported i.e. a single claim process for weekly payments and for statutory benefits.

6. At proposals 26 and 28, the Proposals to regulate notifications for pending claims are supported. Currently, injured employees are not afforded specific and adequate grounds why liability for the claim is unable to be decided. Further, the requirement to re-issue the Notice every 14 days maintains an
obligation upon the insurer to keep the key parties informed and, to address
the issues purportedly in dispute.

7. Referring to proposal 29, Minor Claims, overall the Department supports this
initiative. This is a practice which we already adopt with minor claims both
medical expenses only claims and those with minimal lost time where liability
may be in dispute. We believe this enables expedient processing of claims
without the need to determine liability.

There are however, concerns that the proposal may be inconsistent with the
fundamental right of an employee to an early and sustainable decision in
respect of the occurrence of Injury. Also, In the event of an adverse
development in the injury, employees may have difficulty in accessing
information or locating witnesses to assist in establishing claim liability, the
employee may be prejudiced, and will bear the burden of proof.

A decision in respect of claim liability is the most important decision in the life
of a claim. The scheme framework must provide that approved insurers
ensure that adequate and proper resources are focused upon the decision.
The Act currently provides that if the initial decision in respect of claim liability
is adverse, the employee is in an early position to address and resolve the
issues in dispute — for every case, this outcome should be preserved.

8. In respect of proposal 30, Recurrence of Injury, an injured employee should
not be expected to complete questions aimed at a ‘recurrence’ — it is a
complex medical issue that is within the exclusive jurisdiction of the Tribunal
to resolve. The universal requirement for the use of a form containing
questions aimed at disclosing any history of symptoms might assist
employees in providing information and, in insurers gathering information.
However, the form of the questions should not be specifically directed at a
‘Recurrence’.

At paragraph 239, it is recommended that expenses for vocational
rehabilitation services, report and other investigation fees incurred by an
Insurer are excluded from the statutory entitlement; and that for employees
located in regional areas, the prescribed entitlement is increased.

9. Referring to proposal 36, Common Law Impairment Assessment Expenses,
we support the change to limit the entitlement for payment of AMS expenses
associated with a worker’s common law assessment to the first impairment
assessment only. Under the current system common law impairment
assessments can involve multiple assessments by AMS and workers’ are
entitled to reimbursement of these expenses under the claim. Currently there
is no limit to the number of assessments a worker can have, incurring
significant costs that add to the overall cost of the claim.

10. Referring to proposal 40, Entitlement to Leave While Incapacitated, we
strongly oppose part III which prevents the suspension of weekly payments
during periods of leave as this disadvantages the worker and employer. If a
worker accesses annual or long service leave whilst partially fit and

GOVERNMENT OF WESTERN AUSTRALIA
participating in a return to work program this is likely to delay their return to full duties and result in the workers being on compensation payments for longer. This increases the cost of the claim and results in more severe injuries (i.e. injuries resulting in lost time > 80 days). This also disadvantages the worker who is taxed more heavily due to their higher earnings during the period of leave. Being able to suspend weekly workers' compensation payments (where the worker provides written authority to do so) for the period of leave preserves the workers' entitlement and does not add unnecessary costs to the claim.

11. Referring to proposals 41 and 42, Compensation for Permanent Impairment, we do not support permanent impairment assessment becoming an independent entitlement. The current provisions enable workers to access compensation for permanent impairment and redeem the claim, encouraging the worker to be responsible for ongoing management of their condition rather than being dependent on the workers' compensation system. Enabling access to permanent impairment without entering into a settlement will increase the cost of claims as workers' are able to continue accessing their entitlements.

12. At proposal 80, Application to Vary Compensation, the concurrent use of Sections 60 and 62 of the Act has been abused, including frivolous allegations of genuine dispute. It is arguable whether the proposal will avoid similar behaviour. It is possible that the existing framework is proper and adequate if utilised within the meaning of the Act.

13. At proposals 81 and 82, General Power to Vary Compensation, the proposals to provide clarity within Section 61 are supported. However, the present framework within the Act treats the employee's right to weekly payments as sacrosanct – this status should not be diluted and must be preserved. Section 61 is subject to abuse by insurers and employers – in particular, the unilateral cessation, diminution of weekly payments is improper. The Act should expressly provide a definition of return to work within the consolidated claim management provisions of the proposed Act.

14. At proposal 83, Returning to Renumerated Employment, the Act should limit, avoid providing for the unilateral decision of an insurer to suspend, cease or diminish the rate of a weekly payment. In respect of any amendment to Section 59, it is inappropriate that an insurer should have the right to suspend payment of compensation where information has not been tested, or established as fact. Mere rumour or innuendo should be insufficient to ground suspension of payments. The Proposal does not provide for any safeguard. In my view, the Proposal is at risk of abuse. The Act treats sacrosanct the employee's right to weekly payments and a new statute should ensure similar.

15. Proposal 87, Definition of "Medical Practitioner", we do not support the proposal for the definition of medical practitioner to include persons appropriately qualified and registered outside the Commonwealth as a medical doctor. Overseas doctors are unlikely to be aware of the medical practitioner's role in promoting proactive injury management and workplace rehabilitation and are more likely to certify the worker as being totally...
Incapacitated if the worker is residing overseas where returning to the pre-injury workplace is not feasible. This proposed change will create a barrier to achieving a return to work outcome in these circumstances.

16. In relation to proposal 88, Entitlements of Workers in Custody, it is submitted that an employer should apply the current machinery of the Act (i.e. establish the fact that the employee is in custody or is imprisoned) before any suspension of weekly payments. The new statute will provide that payments may be suspended from a date at the discretion of an Arbitrator; this is sufficient to address the purported issue. In our view, provision for unilateral decision-making by an insurer-employer is a risk, is opposite to the intention of the Act and should be minimised.

17. In proposal 101, Medical Certificate Regulations, we support the introduction of regulations to prescribe requirements or conditions on the issuing and content of medical certificates. We recommend these regulations clarify the treating medical practitioner’s responsibility to actively facilitate return to work both in terms of assessing work capacity and ensuring medical certificates are provided to the employer (and worker) in a timely manner. Currently, there are no guidelines for doctor’s prescribing the manner in which medical certificates should be sent to an employer. There is a tendency for doctor’s to rely on posting medical certificates to the employer which results in delays in the return to work process particularly if the worker is not being provided with a copy of the certificate which has been our experience. We believe that wherever possible medical certificates should be transmitted electronically and that this should be mandated in the regulations. In addition to the regulations we believe guidance material should be developed for medical practitioners explaining their role and responsibilities and training/education be available to assist doctors in the management of work-related injuries.

18. In proposal 107, Pre-Injury Position and Suitable Duties, whilst the new statute will clarify when the 12 month period that an employer is required to keep the worker’s pre-injury position available for commences, it does not address how any periods of total capacity (where the worker has returned to pre-injury duties) within the 12 months will be dealt with in terms of calculating when the 12 months concludes. We consider that further clarification of this issue is required in the new statute.

In respect of Section 84AA of the Act, it is submitted that the new statute expressly provide that an employer is obliged to make reasonable adjustments to accommodate the injury, return to work – in this respect, the new statute would be consistent with EEO legislation.

19. In proposals set out in 110 - 113, Injury Management Case Conferences are supported. Presently, representatives of approved Vocational Rehabilitation Providers utilise medical appointments established by workers for discussing return to work when the primary purpose of the appointment is the worker’s medical management. Amongst other things, courtesy and privacy should be respected – the Act must provide that an employer or insurer establish an Injury Management Conference.
It is strongly recommended however that WorkCover provide written
guidelines for medical practitioners to assist them in understanding their role
in the case conference and how they can contribute effectively to this process.
The treating medical practitioner is critical in terms of engaging the worker in
the return to work process and in assessing work capacity. If they are not
conscious of the importance of early intervention and return to work then this
will be a significant barrier to the success of case conferences and workplace
rehabilitation. It has been our experience that sometimes the treating medical
practitioner sees their role more as an advocate for the worker rather than
providing information that will assist in the development of an action plan to
assist the injured worker to return to work. More education in addition to
guidance material is needed for medical practitioners working in the workers' compensation system.

20. Referring to proposal 120, Health Service Directions, we strongly support the
proposal to enable WorkCover to issue directions establishing rules for
determining whether a treatment or service is reasonably necessary; limiting
the kinds of treatment and services for which an employer is liable; and
establishing standard treatment plans for the treatment of particular injuries or
classes of injury. Currently there is a tendency for medical practitioners to
continue recommending treatments where there is no demonstrated benefit to
the injured worker but the injured worker believes it to be beneficial. This
increases the cost of the claim and maintains a dependence on the compensation system rather than encouraging self management strategies. It
also encourages workers' to seek a medical solution to their symptoms when
this may not be realistic and this has been shown to result in poorer
outcomes.

There are however, concerns that a decision in respect of proposed medical
management should be based upon the totality of the Information available;
the merits of the case; and the informed opinion of treating medical
practitioners. It should be considered that, rather than directions, the Act
should provide guidance in respect of outcome based treatment plans.

21. At proposal 139 and 141, Self Insurance, attaching conditions to a self-
insurance approval must be based upon an annual review. Presently, the
methodology applied by WorkCover in undertaking an annual review is not
transparent. The issue of conditions is subject to procedural fairness; the Act
should provide for regulation of the annual review including the nature, extent
and transparency of the audit required to be undertaken.

22. At proposals 143 to 145, Licensing, the new statute must provide a robust
methodology for the approval of a license to insure liabilities under the Act
and a robust system of performance measurement of approved Insurers as
well as a transparent process.

23. At proposal 165, Insurance Commission and Public Authorities, the Proposal
to deem RiskCover an approved Insurer is recommended i.e. that RiskCover
Yours sincerely,

We thank you for the opportunity to provide feedback.

24. Proposed revend regulatory framework

is subject to the obligations of an approved insurer within the meaning of the

17February 201
Dear Mr Gillingham,

Thank you for providing the opportunity to comment on the 2013 Review of the Workcover Compensation and Injury Management Act 1981.

With regard to proposals 13 and 14, I note and support the clarification of the nomenclature of the crown and amendments to the Act to bring the provisions requiring proceedings against the Attorney General into alignment with current practice.

I have no further comments to make with regard to the other proposals contained in the discussion paper.

Thank you for bringing this matter to my attention.

Yours sincerely,

[Signature]

DIRECTOR GENERAL

8 NOVEMBER 2013
To whom it may concern:

This is a submission outlining the position of the employer South Metro Health Service in relation to the following sections of the review paper for the workers compensation and injury management act 1981:

**Division 7 pg 432 settlement of claim.**

The limitation of using 92(f) deeds only for common law situations when PI is confirmed will, in our view, severely restrict the ability for employers and employees to settle claims early when the circumstances allow and both parties are agreeable. The settlement through MOA is restrictive and does not pertain to claims that are declined or pend and often in these situations a comprehensive settlement with consent of both parties is in our view better and more comprehensively effected through the 92(F) deed, providing greater clarity to both parties.

SMHS seeks for the Act to continue to allow the 92(f) as this offers the employer and employee an alternative option when liability is disputed, medical evidence is inconclusive and all parties are in agreement that a settlement is in the best interests of the worker and employer.

**Division 4 - not participating in a RTW page 121**

The proposed changes indicated a requirement for workers to participate in a RTW and to expand on the definition of participate. It does not explain:

The questions that, in our view, need to explored further are:

- what would be considered non-compliance i.e. employee missing RTW days regularly or a set timeframe in which they do not attend?
- What does the employer need to do to demonstrate that all steps have been taken to provide a suitable RTW with meaningful duties?
- What are the enforceable consequences of the non-compliance if established?
With these clarifications clearly articulated in the act, this section will become more meaningful and will strengthen the return to work approaches advocated and underlying principle of the act.

Part 1 section 6 definitions: Injury
(The review did not cover this section of the current act pertaining to the definition of injury)

SMHS requests that consideration is given to amend the definition of injury.

Our view is that the current definition of injury should be extended to include the exclusion for:

"administrative action taken in respect of the employee's employment" injuries similar to the Eastern States and ComCare Safety and Compensation Act 1988 5A(1)

In this Act:

"Injury means:

(a) a disease suffered by an employee; or
(b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or
(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment."

This would allow employers to address in a reasonable and practicable way any management and administrative processes including business and service realignments and performance management processes whilst still allowing for any harsh or unreasonable approaches to be compensable. This will also allow management to ensure they can manage within the code of ethics and policy and procedures of the organisation without incurring claims of workers that may disagree with those processes, whilst workers are still protected against harsh and unreasonable approaches by management. It will also provide greater clarity for employees in relation to the prerogatives of managers and supervisors to be able to undertake their duties and the correct way of addressing disagreements through IR and HR processes rather than workers compensation claims. Currently we believe that stress-related claims can be used to address industrial disagreements rather than unreasonable action from management.

I am happy to discuss any of the above points further if clarification is required.

Kind thanks

[Signature]

Area Manager OSH

South Metro Health Services.
Dear Mr Gillingham

REVIEW OF THE WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981 - DISCUSSION PAPER

I am writing in response to WorkCover WA's discussion paper outlining proposals to redraft the Workers' Compensation and Injury Management Act 1981, and inviting submissions from stakeholders.

A team of senior managers and workers' compensation claims practitioners within the RiskCover Division reviewed your discussion paper and proposed the response attached.

The Insurance Commission endorses the following proposals without comment: 1-6, 7, 12-14, 16, 18-20, 22, 24, 30, 32 & 33, 36, 38-40, 43-62, 72-78, 80, 82-86, 89, 94-96, 98 & 99, 101-103, 105-109, 110, 113-116, 118-129, 134-137, 140-142, 147, 157-160, 166, 173-175, 179 and 181 & 182. It has no comment to make about the proposals numbered: 10, 131-133, 138 & 139, 149-156, 162 & 163 and 170.

We have attached a schedule containing the Insurance Commission's comments on the remaining proposals. The schedule also includes comments concerning two additional matters which the Insurance Commission proposes WorkCover consider for inclusion when redrafting the Act.

The Insurance Commission's contact if you wish to discuss elements of this submission is [Contact Information]

Yours sincerely,

[Signature]

CHIEF EXECUTIVE
Definition of Worker

P:6 - It is proposed the definition of 'worker' in the new statute be based on the 'results test' to distinguish between workers and independent contractors.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:8 - It is proposed provisions relating to casuals, police, personal representatives and dependants of deceased workers be structured as separate subsections within the definition of 'worker'.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Work for private householders

P:9 - It is proposed 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.

ICWA endorses this proposal. However, for purposes of clarity, there may be a need to develop and insert a definition or general description of "domestic services" to include for example, nannies, carers, gardeners, home maintenance (plumbers, carpenters, electricians) and personal trainers.

Religious workers

P:11 - It is proposed provisions regarding 'religious workers' be consolidated in the new statute.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Overseas workers

P:15 - It is proposed the new statute include a provision to deal with overseas workers based on an express period of cover for 24 months.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.
Definition of 'compensation'

P: 17 - It is proposed the new statute introduce a broad definition of 'compensation' encompassing all entitlements.

ICWA supports this proposal subject to the definition of 'compensation' being clear and unambiguous and adhering to the principles of plain language as set out in paragraphs 64-66 of the Discussion Paper.

Medical certificates

P:21 – It is proposed the new statute introduce a head of power for regulations to prescribe classes of persons, other than medical practitioners, who may issue workers' compensation certificates in prescribed circumstances.

Recognising the current pressure on general practitioner services, both in the Perth metropolitan area and in regional areas, as well as the need for injured workers to receive medical attention in a timely manner, ICWA endorses this proposal in principle. There must, however, be strict requirements around; who can issue certificates and in what circumstances they can be issued. Significant concerns exist about the potential for over-servicing by some allied health providers. Over-servicing is not in line with evidence based treatment standards set by allied health Industry bodies. At present there is very little insurers and self-insured employers can do to have over-servicing addressed within the current workers' compensation scheme, so we would not wish to see a greater potential for this to occur.

Where an injured worker requires regular minor treatments following an initial medical appointment, it might be appropriate for a nurse practitioner to provide this treatment and issue progress/final medical certificates. It is ICWA's view that the first medical certificate must always be issued by a medical practitioner unless the injured worker is in a remote area with no timely access to a doctor.

Consent authority

P:23 – It is proposed a consent authority be mandatory, irrevocable and extend to all relevant medical and other information sources.

ICWA strongly endorses this proposal. It agrees that for a claim to be accepted, a mandatory, irrevocable consent is required.

Claim process

P:25 – It is proposed the new statute introduce a head of power for regulations to prescribe the process for making a claim.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill and would appreciate some sense of what would be proposed to be introduced in the regulations.

Pended claims

P:28 – It is proposed the timeframe and notification requirements related to decisions on liability by insurers be prescribed in regulations.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.
P:27 - It is proposed the new statute discontinue the Director's oversight role of claims where a decision on liability is not made within the prescribed time.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:28 - It is proposed where an insurer is not able to make a decision within the prescribed timeframe the insurer must issue a prescribed notice. The insurer must reissue the notice every 14 days until a decision on liability is made.

ICWA opposes the proposed amendment on the basis that it is bureaucratic, adds more process and paperwork for little gain and leaves room for debate in cases where letters might be sent 16 days apart, difficult to administer, and does not add any value to the claims management process. The current provisions in s57A & s57B are adequate. Workers have the right to have their disputed claims determined quickly and efficiently by the conciliation process provided their claims have merit.

Most applications for conciliation are heard within four weeks and Conciliation Officers have the power to make Payment directions under s182K(2) or (4). Therefore the proposed amendments seem contentious, and an unnecessary burden on the insurer/self-insurer.

Since commencing its review of the proposals contained in the discussion paper, ICWA has become aware of WorkCover's alternative to Proposal 28. That is, where no decision is made on liability within the prescribed timeframe (i.e. pending claims), compensation payments are to commence without this being construed as an admission of liability. Additionally, where a decision on liability is not made within 90 days, liability will be deemed accepted.

ICWA strongly opposes the alternative proposal. It is ICWA's practice to only pend claims where there is insufficient information upon which to make a decision within the s57B timeframe. Under the current legislative requirements, ICWA is required to, and does, provide reasons to workers as to why a decision cannot be made, so the worker is aware of the position of their claim. Collection of the information sought is followed up regularly.

ICWA, through government agencies covered in the RiskCover Fund, has a greater representation of stress claims than other insurers/self-insurers participating in the WA workers' compensation scheme. These claims require factual investigations, legal opinions and psychiatric reviews, all of which can take time, especially due to the difficulty in obtaining prompt medical appointments, and requested reports.

Some government agencies offer Injury management to the worker, on a Without Prejudice basis whilst this information is being collected, to help maintain connection with the worker.

Despite WorkCover's statistics about the number of pending claims which are eventually disputed, many stress claims are resolved by s92f Deeds. Often this is the best outcome for all parties, and recognises the "grayness" of some matters.

Automatic payment of up to 90 days weekly compensation, without any mechanism to recover that in the event a matter is successfully disputed, will add to claims costs borne by government agencies. The increasing cost of workers' compensation within the WA Government over recent years is a matter of significant concern to the departments and agencies we serve, we do not want to increase costs more than necessary.
It is considered the automatic payment of up to 90 days weekly compensation, without any mechanism to recover that in the event a matter is successfully disputed, will encourage some workers to lodge claims, knowing they will receive some payment regardless of the merits of their claim. In addition, this measure is likely to result in insurers declining claims instead of pending them to avoid the automatic payments, with consequent flow-on adverse impact on the Conciliation & Arbitration Service.

Minor claims

P:29 - It is proposed the new statute introduce a minor claim pathway allowing for payments of up to $750 (indexed annually) by insurers to workers without an admission of liability.

ICWA will work with WorkCover to develop this proposal further in an endeavour to avoid some of the consequences that have been encountered in other jurisdictions.

Definition of 'prescribed amount'

P:31 - It is proposed the new statute:

i) locate the definition of the prescribed amount in the Compensation Part;

ii) introduce a head of power for regulations to prescribe the annual indexation method;

iii) make clear the prescribed amount is exclusive of GST.

ICWA endorses this proposal subject to seeing and being comfortable with the indexation methodology adopted for annual movement in the prescribed amount.

Definition of ‘other expenses’

P:34 – It is proposed the new statute define ‘other expenses’ to include current worker entitlements that do not form part of the maximum entitlement for medical expenses.

ICWA endorses this proposal subject to the application of an appropriate prescribed cap/limit.

First aid and emergency expenses

P:35 – It is proposed 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 medical treatment (which will not form part of the maximum entitlement for medical expenses).

ICWA endorses this proposal subject to the application of an appropriate prescribed cap/limit.

Calculation of weekly payments

P:37 – It is proposed the new statute simplify the method of calculating weekly payments by basing the calculation for all workers on pre-injury earnings.

ICWA understands that great care will need to be taken in the drafting of these provisions (as there have been attempts previously to achieve clarity and fairness) and are willing to participate in a working group to assist in designing a legislative framework to achieve a fair outcome for all participants.

ICWA commends WorkCover on this initiative and hopes a legislative framework can be put in place to achieve these objectives in a fair manner.
Compensation for permanent impairment

P:41 – It is proposed the new statute provide lump sum compensation for permanent impairment is an independent entitlement and may be obtained without entering into a settlement.

P:42 – It is proposed the new statute provide receipt of lump sum compensation for permanent impairment does not impact a worker’s entitlement to ongoing compensation or constrain the right to pursue and receive common law damages (unless it forms part of a settlement).

ICWA does not endorse the proposal that lump sum compensation for permanent impairments become an independent entitlement without entering into a settlement.

The concept of providing lump sum settlements for permanent impairments has historically and primarily been catered for by inclusion in a Schedule 1 Redemption which redeems the employer’s liability or a standalone Schedule 2 lump sum settlement which does not redeem the liability but does bring about an end to weekly payments and medical expenses. It would seem an assessment of permanent impairment to enable lump sum compensation is predicated and rightfully so, on the assumption of maximum medical improvement and stabilisation of the injury, and theoretically with minimal or no requirement for ongoing treatment.

Under the current statute, if a worker elects to take a Schedule 2 lump sum settlement based on a permanent impairment assessment and at some time later the impairment was assessed at a far higher percentage, the worker is entitled to receive the extra amount (subject to medical evidence that the further deterioration was directly related to the original injury).

The proposal that lump sum compensation for permanent impairments could become an independent entitlement without entering into a settlement, and with such payment having no impact on a worker’s ongoing compensation nor constraining the right to pursue and receive damages (unless the payment forms part of a settlement), does not appear to take into account the concept of maximal medical improvement and stabilisation of the injury being achieved before such an assessment / payment is made. If ongoing treatment is required, then this may result in a future improvement in the worker’s level of impairment, and it is preferable that maximum recovery and stabilisation be reached before such permanent impairments are assessed and compensated. This then begs the question as to what avenues are available to an employer / insurer if following further treatment a subsequent impairment assessment is lower than the one that enabled the payment.

A secondary consideration in leaving permanent impairments linked to settlements is the positive impact on active claim numbers. It stands to reason that employers and insurers want to keep their active claim numbers at a minimum and it is highly likely the proposal to allow permanent impairments being an independent entitlement would lead to an increase in active claims.

Death and funeral entitlements

P:63 – It is proposed the new statute introduce a new framework for death and funeral entitlements.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.
Definition of 'dependent' etc

P:64 - It is proposed the definition of the terms 'dependant', 'member of the family', 'spouse' and 'defacto partner' be consolidated in the new statute and located within the subdivision dealing with death entitlements.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Lump sum death benefit

P:65 - It is proposed the new statute introduce a new maximum 'lump sum death benefit' for family members totally dependent on the worker's earnings.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Lump sum death benefit

P:66 - It is proposed the lump sum death benefit be increased from $283,418 to 2.5 times the prescribed amount (currently $516,855).

ICWA endorses an increase in the lump sum death benefit, but considers a lesser increase than proposed would be more appropriate.

Lump sum death benefit

P:67 - It is proposed no deduction is to be made from the lump sum death benefit for prior workers' compensation payments to the deceased worker.

ICWA does not endorse this proposal.

Lump sum apportionment

P:68 - It is proposed the new statute set out, in table form, the family members eligible for the lump sum death benefit and their proportionate share.

ICWA endorses this proposal but reserves its final comment until it sees how this proposal is drafted in the amending Bill. Debate about whether such a statutory provision should replace provisions in a person's Will may be needed.

P:69 - It is proposed totally dependent children be entitled to a share of the lump sum death benefit in addition to the prescribed children's allowance.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:70 - It is proposed the lump sum payment for a partial dependent be an amount proportionate to the loss of financial support suffered. The lump sum payment is not to exceed the maximum amount for total dependency (or the prescribed maximum for a dependent spouse, defacto partner or child).

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:71 - It is proposed the new statute no longer provide for a minimum amount payable as a death benefit to dependents.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.
Medical examinations

P:79 – It is proposed the new statute consolidate provisions relating to employer initiated medical examinations.

ICWA endorses this proposal. In the case of insurer referrals, ICWA would like there to be provisions setting out the consequences for failure to attend without reasons.

General power to vary compensation

P:81 – It is proposed the new statute clearly outline the specific circumstances in which an employer can vary (discontinue, suspend or reduce) a worker’s entitlement.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Definition of ‘medical practitioner’

P:87 – It is proposed the new statute define ‘medical practitioner’ to include persons who are:

i) registered by the Australian Health Practitioner Regulation Agency;

ii) appropriately qualified and registered outside the Commonwealth as a medical doctor.

ICWA endorses this proposal. However, we would like to see that the services of medical doctors who are only registered outside of the Commonwealth are only used or approved when the injured worker is living or receiving treatment outside of Australia.

Entitlements of workers in custody

P:88 – It is proposed 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.

ICWA endorses this proposal, provided there is not automatic reentitlement without appropriate medical certification and there is a valid claim for ongoing entitlements.

Safety net arrangements where employer uninsured

P:90 – It is 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 (in accordance with current s175).

ICWA endorses this proposal, but on the basis that, in any orders issued, it is clearly stated who is the payer.

P:91 – It is proposed 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.

ICWA does not endorse this proposal.
ICWA supports workers' compensation as a legal remedy for workers.

Intergroup to assist in designing and negotiating a settlement framework to achieve a fair outcome for all participants, ICWA supports workcover's governance framework as to legal advice for workcover.

As will proceed to ICWA understand that greater care will need to be taken in the drafting of these provisions and we are more than willing to deliberate on a working draft. ICWA will not disagree with the need for greater care.

ICWA understands that greater care will need to be taken in the drafting of these provisions and we are more than willing to deliberate on a working draft.

The settlement is subject to ICWA's understanding of the need to align with ICWA and common law.

If a settlement could be introduced to proceed with settlement documentation, it would deliver a clearer cost picture. The out of pocket costs of settlement documentation and then the processing of the settlement is subject to ICWA's understanding of the need to align with ICWA and common law.

In some respects, the current settlement documentation is a high degree of expertise.

There is also uncertainty about the cost to be applied to determining if the proposed settlement is subject to ICWA and the settlement.

ICWA understands that greater care will need to be taken in the drafting of these provisions and we are more than willing to deliberate on a working draft.
Code of Practice (Injury Management)

P:97 - It is proposed the key requirements outlined in the Code of Practice (Injury Management) be included in the operative provisions of the new statute, as appropriate.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Issuing of medical certificates and work capacity

P:100 - It is proposed 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.

ICWA endorses this proposal. RiskCover has experienced situations where workers have not obtained regular medical certificates which has hampered return to work outcomes. ICWA strongly supports the requirement for workers to provide initial and progress medical certificates in order to receive entitlements.

Pre-Injury position and suitable duties

P:104 - It is proposed 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.

ICWA supports this in principle but for many employers it will be difficult to provide the worker with part of their job and still operate effectively, i.e. Prison Officers with partial capacity may not be able to safely return to prison officer duties if they cannot run or restrain prisoners.

Some flexibility is needed for both the employee and employer. A statute can be a blunt instrument in this space where for sound reasons, one or other of the parties may not see a return to the pre-injury position as a good or even viable outcome.

Injury management case conferences

P:111 - It is proposed 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.

ICWA supports the concept of injury management, case conferences and recognises the benefits which can be achieved. However, ICWA is concerned about legislation forcing any party to attend such a conference. Forcing parties to come together is usually unproductive. The intent of this proposal needs further consideration and development.

P:112 - It is proposed 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.

Whilst ICWA accepts that case conferences usually occur after liability is determined, it does not endorse this proposal because there may be circumstances where discussion involving questions of liability at case conferences may be appropriate and necessary for either or both parties.
Specialised retraining programs
P:117 - It is proposed the specialised retraining program regime be discontinued.
ICWA endorses this proposal as it understands this program has not been accessed at any time.

Exclusion of war
P:130 - It is proposed workers' compensation insurance policies be required to indemnify claims arising out of war and other hostilities.
ICWA points out that it is likely that insurers will not be able to secure reinsurance protection for this type of event. This proposal may appear to be one that has Government asking insurers to cover risk which then winds up being risk borne by Government. WorkCover will need to consider how it will provide protection for approved insurers and self-insurers, particularly for a catastrophic war or hostilities related event.

In paragraph 588, mention is made of the standard policy of Insurance Imposed on Insurers, and underpinned by regulations. It goes on to state that employers are not required to insure for an aggregate amount of damages (common law) exceeding $50 million. The standard policy, at clause 9, refers to an agreed amount of cover that is not less than $50 million. This appears to be inconsistent.

The minimum amount of cover at $50 million was established following discussions with the insurance industry, including ICWA, in about 1994. This amount is overdue for consideration for possible increase commensurate with increases in CPI or some other relevant index.

Licensing of insurers
P:143 - It is proposed the new statute introduce the term 'licensed insurer' to replace the term 'approved insurer'.
ICWA prefers to retain the term 'approved insurer' rather than 'licensed insurer'. This term is more functional, particularly in view of Proposal 165 where it is proposed to deem ICWA to be an 'approved insurer', ICWA will not be seeking a 'licence' to perform its functions.

P:144 - It is proposed the new statute empower WorkCover WA to license insurers.
ICWA does not endorse this proposal. See comments on Proposal 143. ICWA operates WA self-insurance arrangements including workers' compensation. ICWA does not seek approval for licensing for property or liability insurance for that reason. Workers' compensation is no different.

Conditions on licensed insurers
P:145 - It is proposed the new statute empower WorkCover WA to impose conditions on licensed insurers.
ICWA does not endorse this proposal in accordance with its comments for Proposal 143.
Insurer performance monitoring

P:146 – It is proposed the new statute provide WorkCover WA with express authority to monitor whether an insurer complies with licence approval criteria and conditions.

ICWA does not have any substantive comment on this proposal, as it is deemed an insurer under s44 of the ICWA Act, and will therefore be subject to such unknown 'licence approval criteria'.

Approved insurer – requirement to quote

P:148 – It is proposed the new statute oblige insurers to provide a quote on the premium likely to be charged, if requested by an employer.

ICWA endorses this proposal. However, mindful of Proposal 165 to deem ICWA to be an approved 'insurer' and s44 of the ICWA Act, the principles outlined in paragraph 694 should not be undermined by this proposal.

Cancellation of policies

P:161 – It is proposed the new statute enable WorkCover WA to permit an insurer to cancel a policy of insurance for nonpayment 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.

ICWA endorses this proposal. However, more detail is required about the extent of time for the prescribed period. Remedies will be important to canvass.

Insurance Commission and public authorities

P:164 – It is proposed section 44 of the Insurance Commission of Western Australia Act 1986, in relation to the self insurance status of public authorities, be repealed.

ICWA does not endorse this proposal.

The WA Government has been self-insuring its liability to pay compensation in accordance with the WC&IM Act, and preceding workers' compensation legislation, since at least 1928.

The WA Government, as parent of all its public authorities which are have been members of the RiskCover Fund and the antecedent self-insurance funds and arrangements, has essentially been operating as an exempt employer or self-insurer over the years, but has never sought exempt employer status under the WC&IM Act and the preceding legislation. The position taken has been that the Government is not required to exempt itself under its own legislation, and there has been legal support for this position.

In 1996, when the then State Government Insurance Commission Act 1986 was amended to become the Insurance Commission of Western Australia Act 1986, s44 was included with the objective of providing clarity to the forthcoming amended WA Government self-insurance arrangements for workers' compensation under the RiskCover Fund when it commenced on 1 July 1997.

Around that time, ICWA gave a written undertaking to WorkCover that it would continue to provide statistical information about covers and claims administered, as if it
ICWA also voluntarily abides by the industry developed best practice guidelines for approved insurers which WorkCover has since adopted and modified as the Workers' Compensation Licensed Insurer Best Practice Guidelines.

S44 of the ICWA Act preserves the intent for public authorities, which are members of the RiskCover Fund, to be exempt employers without the need for each public authority to seek an exemption from the Governor. Where WA public authorities are not members of RiskCover (e.g., Western Power, Gold Corporation & University of WA), they are required to obtain a workers' compensation insurance policy from an "approved insurer" or to seek exemption from the obligation to insure under s164.

In paragraph 691 of the Discussion Paper, it is commented that the status of ICWA under the WC&IM Act is not clear. In paragraph 692, there is comment about the status of public authorities as self-insurers, and employers in their own right, implying a lack of clarity of their respective status. In paragraph 683, it is commented that in order to clarify these matters, it is proposed that the new statute deem ICWA to be a licenced (approved) insurer, and public authorities to be employers.

ICWA considers s44 of the ICWA Act clearly articulates that WA public authorities are exempt employers (self-insurers) in respect of workers' compensation, and that ICWA's role is to manage and administer these workers' compensation self-insurance arrangements, as part of its broader function under s6(c) of the ICWA Act, to manage and administer insurance and risk management arrangements on behalf of public authorities.

ICWA is of the view that it's role in managing the self-insurance arrangements of public authorities is clear.

Perhaps the new WC&IM Act might make specific mention of WA public authorities which are members of the WA Government's self-insurance fund (currently the RiskCover Fund), holding exempt employer status. But this is probably not necessary given ICWA (and its forerunners) have been doing this for nearly a century.

**P:165 -- It is proposed the new statute:**

i) deem ICWA an approved insurer in respect of workers' compensation obligations of public authorities;

ICWA endorses this proposal to the extent WorkCover considers it necessary. However, as not all WA Government public authorities are members of the RiskCover Managed Fund, include after "public authorities", "that are members of the Government of Western Australia's self-insurance fund". To reinforce the point above, public authorities currently not members of RiskCover for workers' compensation cover, are; Western Power, Synergy, Verve Energy, Horizon Power, Gold Corporation, University of WA and Murdoch University.

ii) apply the claims procedure and obligations for insured employers and private insurers to public authorities and ICWA respectively.

ICWA has reservations about this proposal. ICWA supports the retention of the exemption from complying with s165D(3) of the Act. ICWA believes injury management is most effective when managed by employers. All agencies of the Fund should endeavour to coordinate injury management activities and support injured workers return to work.
Further, in paragraph 694, it is proposed that ICWA in being deemed an "approved insurer" will continue to administer a government fund and premium (fund contribution) methodology relevant to public authorities. Consistent with the RiskCover Fund being a self-insurance fund, the cover provided to public authorities in respect of workers' compensation, is broader than the standard employers' indemnity policy. This variation should also be continued.

Although not contemplated in the Discussion Paper, ICWA is currently exempt from paying a surcharge in accordance with s14 of the Employers' Indemnity Supplementation Fund Act 1980 in respect of workers' compensation cover provided to public authorities by the RiskCover Fund. This is effectively recognizing that RiskCover, as the WA Government's self-insurance fund, will never make a claim on the EISF. This should be preserved following ICWA being deemed an "approved insurer" in accordance with the proposal 166.

WorkCover and ICWA will need to work closely and agree on how to deal with other matters, where departures from the 'approved insurer' model will need to be preserved.

Mining employers – insurance obligations

P:167 - It is proposed mining employers be required to insure asbestos liabilities with approved workers' compensation insurers under standard insurance policies.

ICWA endorses this proposal.

P:168 - It is proposed the new statute require approved insurers to indemnify mining employers for asbestos diseases from a proclaimed date.

ICWA endorses this proposal.

Conciliation filing requirement

P:169 - It is proposed the requirement to negotiate prior to filing an application for conciliation be discontinued.

ICWA endorses this proposal. Parties should still be encouraged to negotiate but it should not be made mandatory to do so. The presumed intent of this provision is to push parties to negotiation before court does not appear to be working well. Having negotiation between unwilling parties a 'must do' before conciliation is not working.

Appearing In the Conciliation and Arbitration Services

P:171 - it is proposed the new statute specify the classes of persons who may attend on behalf of a party to a dispute.

ICWA provides conditional support for this proposal providing its claims and dispute resolution officers are still able to attend on behalf of its clients and that there is reasonable opportunity for claimants to be represented by people they choose.

Abolition of termination day

P:172 - It is proposed the termination day regime be discontinued.

ICWA strongly endorses this proposal.
Common law settlements – section 92(f)

P:176 – It is 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.

ICWA does not support this proposal and notes that to some extent it contradicts the proposed settlement framework outlined in proposals 92 and 93 of the discussion paper.

P:177 – It is proposed 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.

ICWA does not support this proposal and notes that to some extent it contradicts the proposed settlement framework outlined in proposals 92 and 93 of the discussion paper.

Information management

P:178 – It is proposed the new statute clearly outline:

i) requirements for the provision of information to WorkCover WA;

ii) the circumstances where release of information held by WorkCover WA can occur.

ICWA conditionally supports this proposal but encourages WorkCover not to impose resource intensive reporting obligations on insurers. ICWA will publish its own statistics.

Penalties

P:180 – It is proposed the new statute introduce a penalty unit system for all offences which includes automatic indexation.

ICWA notes this proposal.
ADDITIONAL PROPOSALS FOR INCLUSION IN NEW WORKERS COMPENSATION ACT

Definition of injury and liability for stress claims

While the definition of injury has not been included in the discussion paper, ICWA considers that it should be included, particularly in the context of stress related injuries. ICWA, through RiskCover, manages approximately 60% of all stress claims in the Western Australian workers' compensation scheme. The total number of stress claims lodged with RiskCover annually is around 380 at a cost of $17.8 million. The average cost of these claims is twice that of a physical injury claim. In simple terms, many of the stress related claims ICWA receives arise from circumstances involving or surrounding a workers' performance and the authorities have since well-established that the existing s.6(4) "stress" exclusions do not apply to those claims as there was no expectation of discipline or discipline per se.

ICWA strongly recommends consideration be given to reviewing the current definition of injury with a view to changing it to include the reference to "reasonable administrative action" the wording used in the Australian Government's, Safety Rehabilitation and Compensation Act 1988 (ComLaw / ComCare) which states:

"5A Definition of injury"

(1) In this Act:

Injury means:
(a) a disease suffered by an employee; or
(b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee’s employment; or
(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee’s employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee’s employment.

(2) For the purposes of subsection (1) and without limiting that subsection, reasonable administrative action is taken to include the following:
(a) a reasonable appraisal of the employee’s performance;
(b) a reasonable counselling action (whether formal or informal) taken in respect of the employee’s employment;
(c) a reasonable suspension action in respect of the employee’s employment;
(d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee’s employment;
(e) 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."

As can be seen, this definition of injury is not dissimilar to what we currently have and would provide employers with an increased sense of confidence that those claims arising from their reasonable administrative actions are capable of being defended.

It is believed that over a period of time, fewer stress related claims would be lodged and the claims costs across the WA Public Sector, at least, would ultimately reduce.

Injury Management Performance Auditing

ICWA has been closely involved with the monitoring of the injury management performance of WA Government Agencies in the RiskCover Fund. It has been ICWA's experience that the injury management requirements imposed on employers in the 2006 changes to the Workers' Compensation and Injury Management Act 1981 have not had the intended effect of improving return to work outcomes. This is likely to also be largely the case for private sector employers. While ICWA does not believe increasing requirements on employers will be of benefit, we do believe that a thorough review of an employer's injury management culture and practices can be of value. To this end ICWA recommends WorkCover WA establish an auditing program focusing on large and medium employers with high workers' compensation costs with the aim of improving return to work rates and reducing claims costs.
28 January 2014

Mr Chris White
A/Chief Executive Officer
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Dear Mr White

LEGISLATIVE REVIEW 2013

Thank you for your letter of 27 September 2013 inviting the Public Sector Commission to make a submission in relation to the review of the Workers’ Compensation and Injury Management Act 1981 (the Act).

I am particularly interested in any proposed changes in relation to governance matters as part of this review. This would include the statutory role of the WorkCover WA Authority (constituted under Part V of the Act) and statutory function, powers and associated arrangements relating to ministerial governance and directives. I note that the discussion paper states “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” and that “no significant changes are proposed in relation to the regulation and administration of the scheme” (p. 177).

As Public Sector Commissioner, I have a leading role in monitoring and reporting on how public sector bodies comply with public sector standards and ethical codes of conduct under the Public Sector Management Act 1994. Accordingly, our records indicate that the WorkCover Department, under the governance of the Authority, appears to be operating in an efficient and effective manner with a high level of compliance. I also understand that there is a high level of compliance with respect to Accountable and Ethical Decision Making (AEDM) training within the Department and that the WorkCover Authority also recently undertook their AEDM training in June 2013.
There is an ongoing obligation on statutory boards, such as the WorkCover Authority, to monitor and review their systems, practices, and governance framework to ensure that those systems and practices remain relevant and current to the Board's situation. I recognise that the provisions of section 111 and 111A of the Act which relate to Ministerial accountability reflect the principles of the 1989 Commission on Accountability (the Burt Commission) and I recommend that they be retained in the same or similar form as these provisions allow sufficient scope for the Minister to direct. Section 95 of the Act outlines the member qualifications which also appear appropriate and complement the principles of good governance without compromising representative membership.

Accordingly, I support the review of this legislation and the proposed intention to maintain the current statutory scheme in relation to the WorkCover Authority and its governance of the Department.

Yours sincerely

PUBLIC SECTOR COMMISSIONER