

## **Review of the *Workers’ Compensation and Injury Management Act 1981***

**To**

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# Introduction

This submission is made in response to an invitation by letter dated 27 September 2013 and 3 December 2013 from the Acting Chief Executive Officer of WorkCover WA, Mr Chris White, to provide feedback on the second stage of the review of the *Workers' Compensation and Injury Management Act 1981*.

The second stage of the review involves the development of proposals for a new workers' compensation statute to address:

- outstanding proposals from the Legislative Review 2009;
- identified technical and process issues with the current legislation; and
- the need to enhance readability and consistency in the legislation including contemporary language and drafting conventions.

# Part 1 - Preliminary

## Proposed Part structure

The structure is logical and the Law Society supports that structure.

## Key Changes

The Society supports most of the key changes but notes that the change to the definition of 'worker' is a substantive change to the scope of cover provided by the *Workers' Compensation and Injury Management Act 1981* (the Act).

The language used in the existing definition is not in common usage, and is based on employment relationships which have changed substantially since the Act was first introduced.

## 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.*
- P:7** *It is proposed the new statute include a head of power for regulations to prescribe a worker or class of persons as a worker and the worker's employer.*
- P:8** *It is proposed provisions relation to casuals, police, personal representatives and dependants of deceased workers be structured as separate subsections within the definition of 'worker'.*

All modern industrial societies require some sort of mandated workers' compensation insurance. Workers' compensation schemes have been in effect in Australia for over a century and must rank as one of the most important and successful pieces of social legislation.

Generally speaking workers' compensation systems have as their object:-

- The promotion of safety. This is achieved by placing the burden of paying insurance premiums upon employers, who are best able to modify work practices;
- The provision of adequate compensation in the event of accident with coverage against loss of income and reasonable medical, hospital and rehabilitation expenses.

The fundamental reality addressed by workers' compensation schemes is that most work places can be dangerous environments and accidents are inevitable. Without insurance, workers and their families are at risk of destitution.

Workers' compensation coverage differs between each Australian jurisdiction.

The key aspect of workers' compensation coverage is to ensure that workers who should be covered by workers' compensation are covered. Coverage is indicated in most jurisdictions by the definition of "worker". In other words to be eligible for compensation an injured person must fit within the definition of "worker" in the relevant workers' compensation legislation.

The definition of "worker" is, in effect, determinative of which workers are covered by workers' compensation and which are not.

Traditionally, coverage for workers' compensation was limited to workers working under a "contract of service" and not to those workers under a "contract for service". The distinction, in modern language, is between workers who could be described as being employees, and those usually termed "independent contractors".

The current definition of worker in section 5(1) of the Act reflects that traditional approach:-

*"[worker] ... means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing ..."*

However, over time there has been a decline of employment under traditional employee/employer arrangements. Some of these other arrangements have arisen in an attempt by employers to avoid paying workers' compensation premiums, or payroll tax and others to take advantage of particular provisions of the *Income Tax Assessment Act 1997*. As new working arrangements emerged, the various Australian jurisdictions have modified the definition of worker to ensure that workers under these arrangements remain covered by workers' compensation. In Western Australia this objective was achieved by the "extended definition" of workers in section 5(1) which is in the following terms:-

*“...any person engaged by another person to work for the purpose of the other person’s trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services.”*

The extended definition has a long history and dates back to at least the 1940s and has equivalent provisions in other Australian States. A judicial statement of the rationale of the extended definition can be found in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, a case which concerned an analogous provision in the *Workers Compensation Act 1928* (Victoria) where Dixon J said at 402:-

*“...a consideration of the policy of the provision as well as of its text appears to me to show that the distinction it seeks to draw is between on the one hand an independent contractor whose relation with the principal is special or particular either because it is outside the course of the general business of the contractor or the general practice of his trade or because he has not such general business or is not a general practitioner of his trade, and on the other hand an independent contractor who performs work successively or perhaps concurrently for his customers or others in the course of a definite trade or business carried on systematically or who holds himself out as ready to do so ... no doubt the policy is a matter of inference but it seems reasonable to suppose that it was considered proper that a person conducting a business in the course of which he contracted to perform work should himself carry the risk of personal injuries as one of the hazards of his business, while the man who worked under the contract but only for the employer or without any general trade or business or outside his trade or business should, like an ordinary employee, be insured by the Act against the risk of injury in his work.”*

The present coverage of the Act, as indicated by the definition of “worker” and extended definition, is in accord with long held community expectations regarding workers’ compensation coverage, and has a well settled ambit. Any proposal to change the definition of “worker” is, in effect, a proposal to either enlarge, and/or reduce, and/or change the class of people currently entitled to claim workers’ compensation in the event of injury and therefore requires careful scrutiny.

## **Results Test**

The discussion paper proposes to replace the current definition of worker with a “results test”. As previously mentioned any change to the definition of worker and therefore necessarily affect the present rights to compensation of various members of the West Australian workforce.

The results test is not a new concept, and has been used for many years by the Australian Tax Office to help decide if contractors are conducting a personal services business. For tax purposes the contractor is required to make an assessment to determine if at least 75% of their work meets with all three conditions of the results test.

There are three components to the results test: working for a result, providing tools and equipment, and responsibility for rectifying defective work. These matters are often addressed in written contracts provided by large organisations, but it is submitted are often difficult to apply to small organisations where documentation is poor.

Further, as a search of the phrase “results test” on the Australian Legal Information Institute database can demonstrate, there are numerous cases concerning the interpretation of the key concepts of the that test. For example, the phrase “produces a result” has been the subject of litigation on many occasions. An example is provided in *Skiba v Commissioner of Taxation* [2007] AATA 1705 where it was said of that phrase:-

*62. The phrase “for producing a result” in section 87-18(3)(a) is not defined. However case law makes it clear that the essence of producing a result is performing a service that achieves a specified outcome and not doing work: “An independent contractor undertaken to produce a given result, but is not, in the actual execution of the work, under the order or control of the person for whom he does it”: Queensland Stations Pty Ltd v FCT [1945] HCA 13; (1945) 70 CLR 539 at 545.5. What is involved in the concept is “the performance of a service by one party to another who is to employ men and plant for the purpose and is to be paid according to the result”: Queensland Stations Pty Ltd v FCT [1945] HCA 13; (1945) 70 CLR 539 at 551.4. Also see World Book (Australia) Pty Ltd v FCT (1992) 92 ATC 4327 at 4331; Zuijs v Wirth Brothers Pty Ltd [1955] HCA 73; (1955) 93 CLR 561 at 571.5-573 and Neale v Atlas Products (Vic) Pty Ltd [1955] HCA 18; (1955) 94 CLR 419.*

63. *A result based contract usually has a negotiated contract price for the result achieved and not merely an hourly rate for hours worked: see Hollis v Vabu [2001] HCA 44; (2001) 207 CLR 21; Vabu v FCT (1996) 96 ATC 4898 (courier paid on successful courier deliveries made); Stevens v Brodribb Sawmilling (1986) 160 CLR 16 (trucker paid on volume of timber delivered); Queensland Stations Pty Ltd v FCT [1945] HCA 13; (1945) 70 CLR 539 (drover paid per head of cattle delivered); Humberstone v Northern Timber Mills [1949] HCA 49; (1949) 79 CLR 389 (carrier paid on weight mileage).*

64. *The words “producing a result” require something more than obtaining a payment reward for providing ongoing personal skills and efforts to enable another party (the CESP’s) to produce a contracted for result to their clients. Consistent with the recognised indicia of the independent contractor, the words “for producing a result” require that the personal services income of the individual (Mr Skiba) was paid to him as the contract quid pro quo for producing a result and was not paid until and unless the result was produced.*

This example of legal reasoning shows that simple words or phrases are not necessarily easy to apply to the circumstances of individual cases.

The results test has been adopted in the Australian Capital Territory and the Northern Territory comparatively recently. Both of these States have small industrial work forces in comparison with Western Australia.

It is submitted that as no policy reason is advanced for changing the class of workers who are entitled to compensation in the event of injury, heavy onus rests on the proponents of the results tests to show real benefit in adopting that test.

The principal reason advanced for adopting the results test is as follows:-

*The extended definition of work is a source of confusion for workers and employers about their legal rights and obligations and is difficult to apply to contemporary work arrangements.*



This reasoning is perverse: because parties may be “confused” as to whether a worker has a right to compensation arising out of the extended definition, the confusion will be resolved by taking away that right and removing the extended definition from the Act. Imagine if this reasoning was applied to the right to free speech: confused about your right to free speech – that confusion will be resolved by taking away that right.

The Society is of the view that at present the definition should be retained in substance, using plain English and modern drafting techniques.

### **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.*

The Society supports this proposal although some consideration ought to be given to the position of strata companies.

### **Public company directors**

**P:10** *It is proposed the new statute provide access to the scheme for public company directors on the same terms, and subject to the same criteria, as other working directors.*

This amendment is to provide an ‘opt-in’ system to obtain workers’ compensation insurance for working directors of public companies, on the same basis as that cover is provided to working directors of private companies.

The Society supports this proposal.

### **Religious workers**

**P:11** *It is proposed provisions regarding ‘religious workers’ be consolidated in the new statute.*

**P:12** *It is proposed religious workers who do not otherwise meet the definition of ‘worker’ may be deemed*

Although these paragraphs are said to relate to 'religious workers' the sections in the existing legislation refer specifically to 'Baptist clergymen', 'Anglican clergy' and 'other clergymen'.

The Society would have expected that persons employed by an incorporated part of a Church (such as teachers employed in a religious school) would be within the scope of the normal definition of 'worker'. Paragraphs 127-146 (pages 50 – 53), and the proposed amendments, appear to be directed towards those religious workers who may not receive a wage or other 'normal' indicia of an employment relationship.

The Society supports this proposal, but without further information, suggests that:

- (a) The proposed amendments appear to have the aim of extending workers' compensation coverage to such persons working in all faiths (and presumably regardless of gender despite the gendered language of the original drafting); and
- (b) WorkCover has or will seek stakeholder feedback from religious organisations and if necessary circulate that for further comment.

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

**P:13** *It is proposed a single term (either 'Crown' or 'State') be used to describe the executive government under which public authorities operate.*

**P:14** *It is proposed a claim for compensation or proceedings against the Crown / State be made on the relevant public authority by whom the worker was employed or engaged at the time of the injury.*

The proposals relate to standardising the terms used to refer to 'Crown' and 'State' throughout the Act and advice is being sought (presumably from the State Solicitor's Office) regarding the appropriate term.

They also propose a simplified system for bringing proceedings against the Crown.

The Society supports these proposals.

## 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.*

**P:16** *It is proposed the express period of cover for overseas workers may be extended.*

This section is in regard to the treatment of workers employed in Western Australia but working overseas for extended periods. Section 20 was inserted into the Act in 2004 as part of a national approach to dealing with cross border issues. Its provisions are comparable with and, in some cases, identical to provisions in other States.

The discussion paper recognises that “there is a lack of clarity in relation to coverage of overseas workers”.

It is quite evident from the introduction of broadly uniform provisions nationally, that the primary intention was to enable disputes over jurisdiction as between States to be more effectively resolved. Arguably, this has been reasonably successful, although it cannot be said that all matters of interpretation in regard to section 20 have been dealt with. One of the most helpful decisions of Courts in relation to the section is that of Commissioner Herron in *Tamboritha Consultants Pty Ltd v Knight* [2008] WADC 78.

It is unlikely to be controversial to say that the practice in dealing with claims of workers injured overseas has, since the introduction of section 20, been to apply those provisions in order to determine a “state of connection”. The discussion paper acknowledges, however, that whether the cross border provisions as enacted by all States and Territories apply beyond Australian borders, is open to question.

The current practice is that, if a state of connection is identified, the overseas worker is entitled to the same statutory benefits as a worker injured within the State and as to whom there are no issues with respect to the applicability of the Act.

The discussion paper identifies section 20(3) as being the strongest indicator that the present regime, with respect to determining “state of connection”, is applicable to overseas workers. It, nevertheless, re-emphasises the lack of clarity inherent in the current Act provisions and notes that some jurisdictions do have existing arrangements to deal with overseas workers, tending to support the view that the section 20 provisions are really intended to regulate disputes within Australia, rather than jurisdictional issues applicable to workers injured overseas.

The discussion paper lists 6 elements which are stated to be “key elements” applicable to overseas workers. It is to be assumed that those elements would be incorporated in a package of proposals as indicated above. Significant amongst the key elements listed, is the proposition that the existing section 20 will not apply to injuries occurring outside the Commonwealth (Australian States and Territories).

It is proposed that a new section be inserted which expressly extends workers’ compensation cover to workers working overseas for an express period of 24 months, which may be extended by agreement between employer and insurer.

The Society supports the proposal to include new provisions to deal specifically with overseas workers as it appears that this amendment is designed to clarify their rights.

The Society reserves further comment until the legislative form of the proposal is made available for comment.

### **Repealed provisions**

It is proposed to delete specific provisions about ‘tributers’ on the basis that there are no persons currently, or likely to be, working on that basis. Assuming that this is correct, the deletion of the section is logical and supported by the Society.

The proposal to delete section 16 about maritime workers is said to be required as the historical bases for its specific provisions no longer apply. It is said that the Act provides adequately for application to maritime workers and vessel owners. Specific feedback from maritime unions and vessel owners is required, but if that contention is correct, the Society supports the deletion of section 16.

The Society supports the deletion of sections 12 and 13 as they relate to transitional arrangements, which have no current use.

## Part 2 - Compensation

### Definition of 'compensation'

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

The Society supports this proposal and that the term "compensation" should be redefined to include medical benefits, etc, as well as weekly payments.

### Making a claim

*P:18 It is proposed the requirements and time limits for making a claim be located in the compensation part of the new statute.*

### Requirement to give notice

*P:19 It is proposed the requirement for a worker to serve a notice of injury be discontinued.*

**P:18** - The Society supports the requirements being simplified and available for ready reference.

**P:19** - There is no detail as to the changes (and in particular any new forms) and therefore the Society is unable to determine whether they will indeed have this effect.

### Consistent claim processes

*P:20 It is proposed the new statute establish a consistent claim process applicable to both insurers and self-insurers.*

The Society supports this proposal.

### 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.*

The Society has reservations regarding permitting persons other than doctors to certify injury and incapacity. This proposal raises a general reservation the Society has about the discussion paper, namely that many of the changes are to be detailed in "regulations".

In paragraph 465 of the Discussion Paper it is recognised that a worker's treating medical practitioner play a key part in the injury management of the worker.

The Society's comments will be reserved until the legislation form of the proposal is made available for comment.

### **Consent authority**

**P:22** *It is proposed the new statute introduce a consent authority for the release of a worker's medical and personal information relevant to a claim.*

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

The Society is of the view that the case for change has not been made. Will it be enforced by denying the worker compensation unless he/she complies? Will it apply for sexual abuse cases? Will it apply only to treating doctors or also to those seen for a medico/legal reason?

### **Claim for compensation**

**P:24** *It is proposed the new statute introduce a single claim process to accommodate both weekly payments for incapacity and/or medical expenses.*

#### **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.*

The Society is of the view that a single claim process seems sensible. Once again, the details of the process are proposed to be in regulations. It is the Society's position that so far as is possible, the process should be set out in the statute.

### **Pended claims**

**P:26** *It is proposed the timeframe and notification requirements related to decisions on liability by insurers be prescribed in regulations.*

**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.*

**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*

The Society supports these proposals and would comment that important details are to be relegated to regulations.

### **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.*

The Society has no comment.

### **Recurrence of injury**

**P:30** *It is proposed the claim form and medical certificate be amended to include a section in relation to a recurrence of injury.*

It is noted that paragraphs 220 to 224 foreshadow changes to claims procedure for recurrence of injury. The Society suggests that attention also be paid to claims “resulting from” prior injuries as the provisions of clause 7, Schedule 1 have extended entitlements where the connection with the original injury is tenuous.

The Society also suggests the Notice of Recurrence refer to the date and place of the prior injury and the treatment history. Considerable uncertainty continues to exist regarding the application of sections 73 and 74 and the Society suggests the amended Act define “Fresh injury” and “Recurrence of an old injury”.

The Society supports a scheme which enables apportionment between existing and former employers where there has been a prior compensable injury and subsequent incapacity occurs. This entitlement to contribution from former employers should exist at any time despite the ruling in *EMS Holdings Pty Ltd v Industrial Shipyards Pty Ltd*, Supreme Court library number 980655, 12 November 1998.

The Society supports this proposal.

### 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.*

The Society supports this proposal except that the annual indexation method should be set out in the statute rather than in regulations.

### Compensation entitlements

**P:32** *It is proposed the new statute consolidate a worker's entitlements in the Compensation Part and clearly identify provisions applicable to each class and entitlement.*

The Society supports this proposal.

### Definition of 'medical expenses'

**P:33** *It is proposed the new statute define "medical expenses" to include all medical and allied health expenses currently capped at 30% of 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.*

The Society supports these proposals as they do not seem to involve a change of entitlement.

### 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).*

The Society supports this proposal.



## Common law impairment assessment expenses

**P:36** *It is proposed the new statute clarify the entitlement for expenses associated with a worker's first common law impairment assessment includes the cost of referrals to medical practitioners or specialists in order to complete the assessment.*

The Society supports this proposal.

## 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.*

**P:38** *It is proposed the new statute extend the operation of current Amount Aa to accommodate calculation of earnings for part-time Award workers.*

**P:39** *It is proposed weekly payments of workers (Award and non-Award) who have entered into concurrent contracts of service be calculated on the basis of pre-injury earnings.*

The Society supports simplification. It is suggested that the principle should remain of keeping earnings close to what they would have been as if the injury had never occurred.

A significant number of award workers do not work overtime and there is no step down after 13 weeks. This proposal will result in a worker's weekly payment being reduced by up to 15% after 13 weeks of incapacity.

The Society does not support the proposals outlined in the Mr White's letter dated 3 December 2013.

## Entitlement to leave while incapacitated

**P:40** *It is proposed the new statute provide:*

- (i) a worker may access accrued leave entitlements while incapacitated;*
- (ii) a worker may receive leave entitlements and weekly compensation concurrently;*
- (iii) leave cannot be paid in replacement of weekly compensation.*

The Society supports this proposal.

## 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).*

This is a major departure from the scheme of the current Act and its predecessor which was that once a worker elected to accept a Schedule 2 payment, he or she gave up forever any Schedule 1 entitlements. A case is not made for a change.

The Society does not support these proposals.

## Noise induced hearing loss claims

### **Audiometric testing**

**P:43** *It is proposed WorkCover WA no longer approve audiometers or audiometric booths.*

**P:44** *It is proposed 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.*

**P:45** *It is proposed the new statute empower WorkCover WA to deem a workplace.*

### **Compensation for noise induced hearing loss**

**P:46** *It is proposed the claims process for NIHL be reviewed and prescribed in regulations.*

**P:47** *It is proposed standard decision making timelines for processing of claims will apply to the insurer of the last liable employer.*

**P:48** *It is proposed a subsequent audiometric test (air conduction) indicating 10% or more hearing loss be deemed prima.*

### **Disputed NIHL tests or assessments**

**P:49** *It is proposed where a party disputes a test or assessment conducted in relation to a NIHL claim, the disputing party is responsible for the cost of any further testing.*

### **No baseline test**

**P:50** *It is proposed where a worker has an audiometric test which indicates 10% or more loss of hearing but a baseline test was not completed, the worker be required to obtain a full NIHL assessment at their expense unless the current employer was obliged to conduct the baseline test.*

**P:51** *It is proposed where a baseline test was not completed a full NIHL assessment indicating 10% or more NIHL*

#### **Full NIHL Assessment**

**P:52** *It is proposed the new statute provide for a full NIHL assessment which: i) will determine both the extent and work relatedness of the hearing loss; ii) may be conducted by an audiologist or an otorhinolaryngologist.*

#### **Apportionment of NIHL liability**

**P:53** *It is proposed the new statute enable an employer, who is liable to compensate a worker for NIHL, to seek a contribution proportionate to the period of employment from other employers where: i) the worker was employed by the other employer in a workplace to the nature of which NIHL is due; ii) the period of employment was within 5 years prior to the date the claim is accepted or determined.*

#### **Provision of information on NIHL liability**

**P:54** *It is proposed the new statute empower WorkCover WA to provide information to insurers on the status of insurance coverage of employers.*

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

### **Compensation for asbestos related diseases**

**P:55** *It is proposed Schedule 5 of the current Act be repealed and provisions impacting on compensation for asbestos related diseases be located in the Compensation Part of the new statute.*

#### **Lump sum compensation for asbestos related diseases**

**P:56** *It is proposed the new statute define an 'asbestos diseases lump sum'.*

**P:57** *It is proposed the new statute clarify the asbestos diseases lump sum applies to workers suffering pneumoconiosis, mesothelioma, lung cancer and diffuse pleural fibrosis.*

**P:58** *It is proposed the asbestos diseases lump sum amount be 30% of the prescribed amount (the current lump sum is approximately 30% of the prescribed amount).*

**P:59** *It is proposed the supplementary weekly payment for asbestos disease be discontinued.*

**P:60** *It is proposed the new statute clarify receipt of the asbestos diseases lump sum finalises statutory payments but does not constrain the right to pursue and receive common law damages.*

### **Successive lung diseases**

*P:61 It is proposed the new statute consolidate the successive lung disease provisions which will include diffuse pleural fibrosis.*

### **Common law procedural requirements for asbestos diseases**

*P:62 It is proposed the new statute align common law procedural requirements relating to asbestos diseases with current practice.*

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

### **Death and funeral entitlements**

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

#### **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.*

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

### **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.*

*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).*

*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.*

The Society has no objection to the lump sum death benefit being increased but would comment that it highlights the inadequacy of the current prescribed amount for living workers.

## **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.*

**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.*

**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).*

**P:71** *It is proposed the new statute no longer provide for a minimum amount.*

### **Dependent child allowance**

**P:72** *It is proposed the prescribed children's allowance of \$54.20 per week (indexed annually) be available to both totally and partially dependent children.*

### **Dependent child allowance and lump sum**

**P:73** *It is proposed the requirement for a child to elect between the prescribed children's allowance and lump sum payment be discontinued.*

### **Funeral and other expenses**

**P:74** *It is proposed the new statute consolidate all provisions relating to funeral expenses and medical treatment for a worker who dies.*

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

## **Death benefits – Trust Account**

**P:75** *It is proposed the new statute provide for payment of the prescribed children's allowance from WorkCover WA's Trust Account either weekly or any other period as specified in an order, but not as an advance payment or commutation.*

**P:76** *It is proposed the new statute provide for the amount of the prescribed children's allowance to be discharged as a liability of the employer/ insurer by payment of a lump sum to WorkCover WA.*

The Society supports these proposals and recommends that scope be allowed for private trustees.

## Redemption of death benefit claim in certain circumstances

**P:77** *It is proposed the entitlement of a dependent to redeem a claim where a worker dies, but the death is not the result of the compensable injury, be discontinued.*

This is obviously the withdrawal of a benefit bestowed by the current Act but since it is a policy decision, the Society has no comment.

## Claim management provisions

**P:78** *It is proposed the new statute consolidate all provisions relating to the ongoing management of a claim.*

### Medical examinations

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

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

## Application to vary compensation

**P:80** *It is proposed the new statute introduce a single provision enabling a worker, employer or insurer to apply to the Conciliation and Arbitration Services to vary (discontinue, suspend, reduce) a worker's entitlement.*

### 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.*

**P:82** *It is proposed the new statute clarify an employer may discontinue or reduce compensation, without issuing a notice to a worker, where an injured worker has returned to work with the employer.*

**P:80/81** - The Society supports these proposals. However, sections 60 and 62 have a long history of case law relating to the interpretation of these sections and presumably this will be taken into account in any proposed new statutory provision. In these circumstances, the Society reserves further comment until the legislative form of the proposal is made available for comment.

**P:82** - The Society is of the view that it is important to continue to give formal notice to a worker where an employer intends to discontinue or reduce compensation, and this is the case even where an injured worker has returned to work with the employer.

### **Returning to remunerated employment**

**P:83** *It is proposed where a worker fails to provide details of remunerated work with another employer upon request, weekly payments may be suspended (without the order of an arbitrator) until the details are provided.*

**P:84** *It is proposed, in relation to commencing remunerated work with another employer, procedural requirements to notify be contained in regulations.*

**P:83** – This Society does not agree with the comment made at paragraph 391, as section 59(6) of the Act clearly contemplates a sanction, although it may have fallen into disuse in practice. The proposal is unsatisfactory in that it leaves it to the insurer's whim as to whether proper particulars have been provided or not. A suspension of weekly payments is always a serious act and any right to suspension should be accompanied with a formal process. Whether that requires the order of an arbitrator can be considered.

**P:84** - There should at all events be a requirement for a written notice as to what the employer is doing and such procedural requirements should be in the statute rather than in the regulations. The Society reserves further comment until the legislative form of the proposal is made available for comment.

### **Suspension of entitlements**

**P:85** *It is proposed the new statute, where required, state expressly whether a suspension is to all forms of compensation or only a specific form of compensation.*

The Society supports this proposal.

### **Workers residing outside the state**

**P:86** *It is proposed the new statute provide, where an injured worker resides outside the state, all compensation entitlements be suspended unless there is a current certificate of incapacity.*

The Society does not support this proposal and recommends that the current procedures remain in place.

### **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.*

The discussion paper refers to “significant practical difficulties” in managing claims where a worker is residing overseas. It may be added that there would be significant difficulties for a worker in obtaining certificates of incapacity in English from a “medical practitioner”. It is important that the certificate be in a simple, easy to obtain form.

The Society supports this proposal.

### **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.*

The discussion paper says that “*whether a worker is in custody or imprisoned is a matter of fact*” but it does not identify who determines that fact. It would be necessary to have an objective test to determine whether a worker was “in custody” rather than simply under arrest.

The Society reserves further comment until the legislative form of the proposal is made available for comment.

### **Disputes between insurers**

**P:89** *It is proposed the new statute clarify the provisions regarding disputes between employers and disputes between insurers, while maintaining the intent of the current provisions.*

The Society supports this proposal.



## 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).*

**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.*

The Society supports these proposals.

## Statutory settlement pathways

**P:92** *It is proposed the new statute introduce a new settlement regime consisting of a:*

- i) primary pathway;*
- ii) secondary pathway available in special circumstances.*

**P:93** *It is proposed a settlement finalises a worker's statutory claim for compensation and ends a worker's right to pursue and receive common law damages.*

The Society does not support these proposals and comment as follows:

### **Primary pathway**

The Society objects to any restrictions on settlement when represented parties have been properly advised that settlement is appropriate. The Society supports the principle that parties to any dispute should have the right to settle that dispute in an expeditious and cost effective manner. The arguments raised for setting up two pathways are misconceived and at odds with practice in other dispute resolution bodies, including all administrative Tribunals exercising jurisdiction in Western Australia.

Redemption agreements will be classified as the “*primary pathway*” for settlements, but will only be allowed where a period of 6 months elapsed from the date the claim for compensation was accepted or determined. It will apply to claims for compensation made by a worker, whether for incapacity (weekly payments) or medical expenses only. It will not be available for claims where liability under the Act has not been accepted. The proposal imposes time and acceptance conditions which are not conducive to prompt and cost effective settlement. If both parties are legally represented and the settlement is recommended, the director should not be empowered to disapprove of the settlement.

The Society supports an amended Act which will use simplified language to clarify the legislative intent surrounding settlements and new forms will replace those currently used.

The Society notes that settlements occur during conciliation and arbitration as these processes identify issues and prompt parties to resolve and determining disputes.

Settlements under the primary pathway will be subjected to Director scrutiny (for adequacy and awareness of consequences), unless a worker is legally represented. The Director's decision on whether or not to allow a settlement will not be amenable to appeal or judicial review.

Pros	Cons
Enhances ability of employers and insurers to finalise claims that are for medical expenses only or where only short term incapacity resulted, eg. dental injury claims. No longer necessary for weekly payments to have continued for 6 months.	Increased costs of justifying settlements.  The matters to be considered by the Director are likely to be of relevance to the parties' decision to settle.
The stated intention " <i>to protect the interests of the worker</i> " is sound.	Lack of ability to get decision reviewed – lack of fairness, impinges on natural justice.

### **Secondary Pathway**

The Act's "*secondary pathway*" will allow settlements in some cases where the *primary pathway* requirements are not met. Settlements filed under the *secondary pathway* will come under scrutiny from the Director (more so than the primary pathway) who must be satisfied that a special circumstance exists and that the settlement is in the worker's best interests.

What constitutes a "*special circumstances*" will be prescribed by regulations and it is not yet clear what these will be. Stated examples are:

- Costs of disputing claim exceed potential entitlements;
- Worker's death imminent;
- Multiple employer/injury claims; (complex?)
- Cross border claims;
- 457 visa worker involved.

It should be noted that special circumstances should apply to psychological injury claims.

<b>Pros</b>	<b>Cons</b>
Creates a settlement pathway that would otherwise not exist.	Increased costs of justifying settlements. May require lengthy submissions and filing of a substantial amount of evidence.
The stated intention “to protect the interests of the worker” is sound.	Query whether parties will be allowed to appeal or obtain judicial review.
Avoids need for section 92(f) agreement pathway and the cost of filing a Writ of Summons in the District Court.	May be time consuming for WorkCover to consider submissions and rule. How long will parties be required to wait for decision on whether matter is settled or not?
Expressly finalises workers’ compensation and common law rights of an injured worker.	Unclear how settlement under secondary pathway will impact on worker’s right to pursue damages against a negligent third party. Is it compensation or damages or both?
	Uncertainty over what constitutes special circumstances. What about stress claims or other liability disputed claims where delayed resolution might be injurious to the worker’s health?
	Long-running liability disputes may be prevented from settling, forcing parties towards Arbitration and what could be an “all or nothing” outcome for them.

### **Schedule 2 Settlements**

Under the proposed amendments it will not be possible to settle claims merely by a Schedule 2 election. It is proposed that the new statute will provide lump sum compensation for permanent impairment as an independent entitlement that can be obtained by a worker at any time, without entering into a settlement. That is, electing to receive a Schedule 2 lump sum will not impact on the worker’s ongoing entitlement to compensation.

<b>Pros</b>	<b>Cons</b>
Allows workers to access their lump sum entitlement at any time, subject to an Approved Medical Specialist (AMS) being able to make an impairment assessment.	Potentially increased Schedule 2 payment amounts. Schedule 2 assessments could be given before adequate time allowed for condition to reach MMI.
	Greater disputation between worker and employer/insurer over Schedule 2 entitlements, adding to WorkCover case load and parties’ costs.

	<p>What if there are varying assessments?  Can the parties reach an agreement, or would the dispute be bound for Arbitration?</p>
	<p>More AMS assessments required, including Approved Medical Specialist panels to resolve disputes, increasing cost of scheme.</p>
	<p>Consider impact of a Schedule 2 election on a subsequently made common law claim. Can a worker later claim to have a higher % of impairment than that upon which an election is based? Can an employer/insurer who agrees to a Schedule 2 payment subsequently deny such an impairment level exists when faced with a common law claim?</p>
	<p>Could encourage ever expanding range of secondary symptomatic body parts in order to access additional lump sum entitlements.</p>

## Part 3 – Injury Management

### Structure of Part

**P:94** *It is proposed the Injury Management Part of the new statute:*

- i) be structured with separate divisions for each discrete aspect of injury management;*
- ii) outline the responsibility of participants under the appropriate division or subdivision.*

The Society is likely to support this proposal but reserves further comment until the legislative form of the proposal is made available for comment.

### Definition of ‘return to work’

**P:95** *It is proposed the definition of ‘return to work’ be located in the Injury Management Part of the new statute.*

The appropriate rearrangement of definitions within the Act will depend upon the overall structure of the Act. Past approaches to legislative drafting have maintained the practice of having definitions at the beginning of the Act, although that has changed over recent years and definitions are sometimes contained in the relevant section of the Act pertaining that issue. Until the overall rearrangement of the statute is available, it is difficult to provide a definitive response.

The Society reserves further comment until the legislative form of the proposal is made available for comment.

### Code of Practice (Injury Management)

**P:96** *It is proposed the Code of Practice (injury management) be discontinued.*

**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.*

**P:98** *It is proposed the new statute introduce a head of power for regulations to prescribe requirements for injury management systems and return to work programs.*

The Society supports the incorporation of the code of practice in the statute.

## **Role of treating medical practitioner**

**P:99** *It is proposed the new statute recognise the injury management role of an injured worker's treating medical practitioner.*

The Society supports this proposal.

## **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.*

The Society supports this proposal but also notes that at iii) it should be accepted that a medical certificate may need to be indorsed with information which indicates that the expected duration cannot be quantified at that point and the workers duration of incapacity may be indeterminate.

## **Medical certificate regulations**

**P:101** *It is proposed the new statute introduce a head of power for regulations to prescribe requirements or conditions on the issuing and content of medical certificates.*

The Society does not support significant changes being relegated to regulations and the introduction of a new head of power should be defined within the statute and not left to administrative discretion.

The Society reserves further comment until the legislative form of the proposal is made available for comment.

## **Form of medical certificates**

**P:102** *It is proposed the new statute empower the WorkCover WA CEO to approve the form of medical certificates.*

Without first being provided further information regarding the scope of the "approval" to be reposed in the CEO, the Society reserves further comment until the legislative form of the proposal is made available for comment.

## Return to work programs

**P:103** *It is proposed the new statute expressly provide a worker must participate in a return to work program (including its establishment) if the employer is required to establish a program.*

The Society supports this proposal.

## 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.*

**P:105** *It is proposed the new statute clarify, where a worker attains partial or total capacity for work but is unable to perform their pre-injury position, the employer is to provide suitable duties to the worker.*

**P:106** *It is proposed the obligation to provide the pre-injury position or suitable duties not apply if:*

- i) *it is unreasonable or impracticable for the employer; or*
- ii) *the worker has been lawfully dismissed.*

**P:107** *It is proposed the new statute clarify the requirement to provide the pre-injury position or suitable duties continues for 12 months, commencing when the worker is first totally or partially incapacitated from work.*

## Dismissal of worker

**P:108** *It is proposed the new statute clarify that an employer must not dismiss a worker solely or mainly because the worker is not fit for employment in a position because of the injury. The prohibition is to apply for a period of 12 months after a worker is first totally or partially incapacitated from work.*

**P:109** *It is proposed the new statute require an employer to notify WorkCover WA, within 14 days of notifying the worker of their dismissal. The requirement is to apply for a period of 12 months after a worker is first totally or partially incapacitated from work.*

The Society supports these proposals and comment as follows:

- Employers are well aware of this provision and will ensure that an injured workers job is kept open for the statutory period of 12 months. However, as soon as the 12 month statutory period had concluded, employers will regularly enquire as to whether the employment can be terminated.
- The protection provided by this provision should be maintained.

- The Society agrees that if the employee is terminated, the employee may (under the present law) have recourse to remedies under the *Fair Work Act 2009 (Cth)* or *Industrial Relations Act 1972 (WA)* and the situation should not be complicated by including protections provided by the industrial/employment law in workers compensation legislation.
- The Society is concerned that small businesses are not disadvantaged and suggest that the requirement to offer alternative duties with another employer may be one way of satisfying the employer's rehabilitation obligation.

### **Injury management case conferences**

**P:110** *It is proposed a worker be required to attend an injury management case conference if requested by the employer or insurer.*

**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.*

**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.*

**P:113** *It is proposed if a worker refuses or fails to attend an injury management case conference without reasonable excuse, an order may be sought in the Conciliation and Arbitration Services to compel the worker to attend. If the worker fails to comply with an order, their entitlement to compensation may be suspended.*

The Society supports these proposals, subject to the proposal including the right of a worker's legal representative to be present at the case conference. The Society notes the importance of a worker's attendance at a case management conference and suggests that an order requiring attendance be readily and easily obtainable, i.e that such an order be the subject of a fast-track application.

### **Workplace rehabilitation definition**

**P:114** *It is proposed the new statute introduce and define the term 'workplace rehabilitation.' The use of the term 'vocational rehabilitation' will be discontinued.*

The Society supports this proposal as long as the new definition incorporates the concepts which are relevant to both "*workplace rehabilitation*" and "*vocational rehabilitation*", which are different goals to be achieved in the rehabilitation process.



## Regulation of workplace rehabilitation providers

**P:115** *It is proposed WorkCover WA may:*

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

**P:116** *It is proposed WorkCover WA may:*

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

The Society supports these proposals.

## Specialised retraining programs

**P:117** *It is proposed the specialised retraining program regime be discontinued.*

The Society supports this proposal.

## Medical and allied health services

**P:118** *It is proposed the new statute introduce a head of power for regulations to prescribe:*

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

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

## Medical and allied health fees

**P:119** *It is proposed the head of power to fix scales of fees for medical and health services be located in the Injury Management Part of the new statute.*

The Society has no comment.

## Health services directions

**P:120** *It is proposed the new statute include a head of power for WorkCover WA to issue directions:*

- i) establishing rules to be applied in determining whether a treatment or service is reasonably necessary;*
- ii) limiting the kinds of treatment and service (and related travel expenses) for which an employer is liable;*
- iii) establishing standard treatment plans for the treatment of particular injuries or classes of injury.*

The Society does not support this proposal. It is appropriate that treatment should always be the prerogative of the treating medical practitioner.

## Part 4 – Medical Assessment

### Regulation of Approved Medical Specialists

**P:121** *It is proposed the new statute include a head of power for regulations to prescribe a framework for the regulation of Approved Medical Specialists.*

**P:122** *It is proposed Approved Medical Specialists be approved for a 3 year period.*

**P:123** *It is proposed the WorkCover WA CEO be empowered to require an Approved Medical Specialist to produce impairment assessments for inspection and review on request.*

**P:124** *It is proposed the new statute include an express power for WorkCover WA to place conditions on the designation of an Approved Medical Specialist, and suspend or revoke a designation for non-compliance with conditions.*

The appointment of an AMS will be for a term of 3 years rather than indefinite.

Although not stated in the discussion paper, there seems to be some ongoing concern over the continuing disparity of Whole Person Impairment (WPI) assessments between different AMS's.

It is proposed that under the changes the Chief Executive Officer of WorkCover will have the power to require an AMS to produce an impairment assessment for “*inspection and review*”. WorkCover will be given a new head of power for regulating AMS's and will be able to suspend and revoke their appointment in case of “*non-compliance with conditions*”.

It is not clear what the level of scrutiny of AMS assessments will be, or whether this move is likely to see any greater consistency in assessments.

The Society does not support these proposals.

### Medical assessment panels

**P:125** *It is proposed WorkCover WA approve a medical practitioner for the purposes of the register of medical practitioners eligible to be a member of a panel.*

**P:126** *It is proposed the WorkCover WA CEO convenes and appoints the Chairperson of all medical panels.*

**P:127** *It is proposed separate provisions for Approved Medical Specialist panels be discontinued.*

The Society supports these proposals.

## Medical advisory committee

**P:128** *It is proposed the new statute empower WorkCover WA to appoint medical practitioners to the medical advisory committee.*

The Society supports this proposal.

## Part 5 – Liability and Insurance

### Policy of insurance - terminology

*P:129 It is proposed the new statute refer to 'policy of insurance' throughout, rather than 'contract of insurance.'*

The Society supports this proposal.

### Exclusion of war

*P:130 It is proposed workers' compensation insurance policies be required to indemnify claims arising out of war and other hostilities.*

The Society has no comment.

### Audit of remuneration declarations

*P:131 It is proposed the new statute provide in prescribed circumstances audit costs incurred by WorkCover WA or an insurer be recoverable from an employer.*

The Society has no comment.

### Remuneration declarations – record keeping

*P:132 It is proposed the new statute require employers to make and maintain correct records of remuneration and the trade or occupation of all 'workers' employed by the employer.*

*P:133 It is proposed the new statute require records of employment be retained for 7 years from the date a worker ceases to be employed by the employer.*

**P:132** – The Society supports this proposal but considers that employees not engaged in trade or business be excluded.

**P:133** – The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

## Remuneration declarations in the contract chain

**P:134** *It is proposed the new statute not require a principal within the meaning of section 175 of the current Act to estimate and verify remuneration details of contractors' workers if:*

- i) the relevant contractor's insurance policy is extended to indemnify the principal for liabilities under section 175;*
- ii) the principal has evidence of the relevant contractor's valid certificate of currency and principal indemnity extension;*
- iii) the principal verifies this information at commencement and renewal of their own insurance policy.*

The Society supports this proposal.

## Contractual indemnities

**P:135** *It is proposed the new statute void any term of a contract which requires an employer to indemnify a third party in respect of the third party's liability to pay personal injury damages.*

**P:136** *It is proposed the new statute prohibit a third party from requiring an employer to obtain a policy of insurance extending cover to a third party for its liability to pay personal injury damages.*

**P:137** *It is proposed the prohibition on contractual indemnities will not apply to a principal extending the statutory indemnity under s175(2) to include liability to pay damages to a contractor's workers.*

**P:135** – The Society is likely to support this proposal but reserves further comment until the legislative form of the proposal is made available for comment.

**P:136** – The Society is likely to support this proposal but reserves further comment until the legislative form of the proposal is made available for comment.

**P:137** – The Society does not support this proposal and reserves further comment until the legislative form of the proposal is made available for comment.

## Self insurance approvals

**P:138** *It is proposed the new statute empower WorkCover WA to approve self insurers and to review, cancel or revoke approvals.*

The Society supports this proposal.

## Conditions on self insurance

**P:139** *It is proposed the new statute empower WorkCover WA to attach conditions to a self insurance approval at any time during the approval period.*

The Society supports this proposal.

## Requirements for self insurance

**P:140** *It is proposed the new statute require each self insurer to:*

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

The Society supports this proposal.

## Self insurer performance

**P:141** *It is proposed the new statute provide WorkCover WA with express authority to:*

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

The Society supports this proposal.

## Use of securities

**P:142** *It is proposed the new statute provide WorkCover WA with express authority to:*

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

The Society supports this proposal.

## Licensing of insurers

**P:143** *It is proposed the new statute introduce the term 'licensed insurer' to replace the term 'approved insurer'.*

**P:144** *It is proposed the new statute empower WorkCover WA to license insurers.*

The Society supports this proposal.

## Conditions on licensed insurers

**P:145** *It is proposed the new statute empower WorkCover WA to impose conditions on licensed insurers.*

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

## 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.*

The Society has no comment on this proposal.

## Insurer to act on behalf of employer

**P:147** *It is proposed the new statute clearly establish where a reference to an employer includes a reference to an insurer.*

The Society supports this proposal.

## 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.*

The Society supports this proposal.

## Approved insurer – requirement to provide insurance

**P:149** *It is proposed an insurance indemnity cover all 'workers' employed or engaged by the employer.*



**P:150** *It is proposed an omission in the request for insurance regarding the description of the employer's business classification cannot be used to refuse to indemnify the employer.*

The Society supports these proposals.

### **Burning cost policies**

**P:151** *It is proposed the new statute provide for and regulate burning cost policies (i.e. policies with an extended period and alternative methods for calculating premium).*

**P:152** *It is proposed the new statute clarify that burning cost policies are optional and must not be used by insurers as a compulsory form of policy - their use and the amount of premium payable must be negotiated between the employer and insurer.*

**P:153** *It is proposed the premium appeal mechanism not apply to burning cost policies.*

**P:154** *It is proposed the standard employer indemnity terms and conditions apply to burning cost policies.*

**P:155** *It is proposed the new statute introduce a head of power for regulations to prescribe specific terms and conditions for burning cost policies.*

**P:156** *It is proposed the requirement to provide an annual statement of remuneration will apply to all employers including those who negotiate burning cost policies.*

The Society supports these proposals.

### **Lapsing of policies**

**P:157** *It is proposed the new statute define when a policy has lapsed.*

**P:158** *It is proposed the new statute clarify an insurer is on risk and must indemnify an employer for up to 7 days from the time WorkCover WA receives a lapsed policy notice by the insurer.*

**P:159** *It is proposed WorkCover WA approve the form and manner in which the lapsed policy notice is to be given.*

**P:160** *It is proposed the new statute make clear a policy of insurance is not cancelled by virtue of having lapsed.*

The Society supports these proposals.

## **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 non payment of premium where:*

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

The Society supports this proposal.

## **Regulation of policy of insurance**

**P:162** *It is proposed all terms and conditions of standard employer indemnity policies be reviewed and prescribed by regulations including the form of the policy.*

**P:163** *It is proposed the new statute enable WorkCover WA to approve, limit or modify policy endorsements or extensions by regulation.*

**P:162** – The Society supports this proposal.

**P:163** – The Society’s comments will be reserved until the legislative form of the proposal is made available for comment.

## **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.*

The Society supports the proposal.

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

- i) deem ICWA an approved insurer in respect of workers’ compensation obligations of public authorities;*
- ii) apply the claims procedure and obligations for insured employers and private insurers to public authorities and ICWA respectively.*

The Society supports the proposal.

## **Mining employers – insurance obligations**

**P:166** *It is proposed the existing insurance regime for workers' compensation liabilities of mining employers be discontinued.*

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

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

The Society is likely to support these proposals but reserves further comment until the legislative form of the proposal is made available, in particular the definition of 'proclaimed date'.

## Part 6 – Dispute Resolution

### Conciliation filing requirement

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

The Society supports this proposal.

### Registered agents regime

*P:170 It is proposed the regulatory regime for the registration of agents be discontinued.*

The Society supports this proposal.

### 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.*

The Society supports this proposal.

## Part 7 - Common Law

### Termination day

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

Without a termination day, the only timeframe that will apply to the commencement of a common law action will be that provided for by the *Limitation Act 2005 (WA)* (3 years).

Pros	Cons
Reduced administrative burden and expense associated with process of ascertaining and giving notification to workers of termination day.	Potential damages claim may take longer to become apparent, impacting on claims reserve.
Reduced medico-legal costs associated with AMS Forms 7 & 8 that are often used for 'common law purposes' to gain termination day extension.	Potential for increased number of claims due to removal of a barrier to common law access.
Allows more time for maximum medical improvement to be reached before impairment assessment becomes necessary.	Weekly payments to continue for longer in cases where WPI < 25% because the step-down provisions will apply at a later point in time.
Less complexity and less uncertainty.	Unrepresented workers may lack awareness of common law rights in absence of a s.93O type notice.
Avoid disputes arising over technicalities.	

The Society supports this proposal.

### Election to pursue common law damages

**P:173** *It is proposed a worker can only elect to pursue common law damages if the Director has recorded the worker's whole person impairment, which must be assessed by an Approved Medical Specialist.*

**P:174** *It is proposed a whole person impairment assessment and common law election maybe lodged and recorded as a single process.*

### Removal of Parties Ability to Agree to Whole Person Impairment

The ability of parties to agree to an impairment level for common law parties will be removed. This follows from the changes to section 92(f), which is intended to limit settlements under that provision to genuine common law claims.

In other words, the impairment threshold must actually be attained by the worker (as opposed to being agreed in order to facilitate a settlement).

Pros	Cons
	Medico-legal costs of WPI assessments are incurred where satisfaction of impairment threshold is obvious and undisputed.
	Unnecessarily limits the ability of the parties to reach agreement on issues.

The Society does not support these proposals.

### Commencement of proceedings

**P:175** *It is proposed the new statute require the common law threshold and procedural requirements be met in relation to an injury prior to the commencement of proceedings for damages.*

The new statute will require an election to be submitted by the worker to the Director along with an impairment assessment of at least 15% and to have the election registered before a worker can institute proceedings for damages.

Currently the constraint in section 93E is on the awarding of damages, not on the commencement of the action. Currently the action can be commenced, if desired, before the worker's WPI is even known and before any election is made.

According to WorkCover the current position is an anomaly that has allowed common law settlements to take place without the Act's threshold and procedural requirements being met.

Pros	Cons
Reduced common law defence costs to employers and insurers. Only legitimate common law claims will be served.	Potential disadvantage to workers where limitation of action time frame could pass before an election can be registered, for example if maximum medical improvement has not been reached.
	Impacts on early attempts to settle a claim for damages before registering an election.
	Common law claims may come to light at a later point in time, impeding early investigation and resolution.

What if the worker's claim for damages is against a defendant who is not the employer? Such a Writ can be filed and served at any time. The defendant may wish to join the employer as a third party on the basis it was a joint tortfeasor. There are obvious implications here in terms of the validity of a third party notice. Must filing of the third party notice be delayed and hold up the worker's main action?

What if the worker doesn't elect as against the employer but has a WPI of 15% or more and could have elected had they chosen to do so? Will the right of a non-employer to claim contribution or indemnity from another tortfeasor (the employer) be constrained by the choice of a worker about whether or not to register an election? This is a current problem under the Act that the discussion paper does not address and which requires clarification.

The Society reserves further comment until the legislative form of the proposal is made available for comment.

### **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.*

***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.*

The Society supports an inexpensive and expeditious settlement for claims and does not support these proposals.

The discussion paper asserts that this section was enacted to prevent double recovery and was not intended to be a settlement pathway. It has however been increasingly used as a means of settlement. Section 92(f) became a settlement pathway as a result of:

- the perceived inability to settle claims by redemption when weekly payments had not been continuing for 6 months, the necessary further implication being that liability for the claim had not been admitted or determined;
- the perceived inability to settle claims by consent judgment where there had been no determination of the whole person impairment of at least 15%; and
- the continuing societal and commercial benefit recognised by all stakeholders in being able to settle disputed statutory entitlement claims.

Presently, section 92(f) is used extensively in an admittedly artificial way as a vehicle for settlements. This is recognised by all stakeholders and by WorkCover. If another practical vehicle for achieving settlements was available, it is likely that it would be used because the procedure necessary to adapt section 92(f) is cumbersome and relatively inefficient.

In the discussion paper, it is proposed to amend the current provisions of section 92(f) to remove this as a pathway for settlement, except for “*genuine common law settlements*”. A settlement under section 92(f) will be void unless the common law impairment threshold and procedural requirements are met in relation to the injury.

These amendments would mean that section 92(f) would cease to be a commonly used settlement pathway and, therefore, if that was the intention of the amendment, it would be successful. There would, however, be absolutely no need for the section to be amended if an alternative satisfactory means of achieving settlement was available.

It is likely that the proposed amendments will achieve the intended result, but the question arises as to whether that intended result is the best outcome in terms of the operation of the Act.

The proposals go far beyond the current scope of the section. As it stands, the section does not concern itself with the validity of the settlement of the common law proceedings. The section merely provides that when a claim in which common law proceedings have been issued is settled by deed, if the Director disapproves of the settlement, it does not thereby bring to an end the worker’s rights under the Act. In those circumstances, that does not necessarily mean that the common law settlement is void.

It should be noted that Deeds allow for greater flexibility with regard to settlement terms than do prescribed forms. The Deed can be multi-party in complex cases and can accommodate a broad range of settlement terms.

The proposal to effectively disallow such settlements altogether, where the common law threshold has not been attained, amounts to a substantial and unwarranted interference in cases in which the concerns that have resulted in the amendments being proposed do not arise, i.e. the section is not being artificially used as a settlement vehicle. The section also has the potential to restrict the ability of parties to resolve claims where liability is not accepted.



It also seems entirely uncontroversial that it is desirable that parties should be entitled to reach an early settlement of some common law claims even though there has been no determination of impairment. This may occur in cases where parties may reasonably conclude that there would eventually be an impairment assessment of at least 15%, but where it is opportune and mutually advantageous to settle early. Such settlements would not be possible under the proposed new regime, though it is difficult to find any objection in principle to such settlements taking place. Workers who may or may not attain the 15% threshold are precluded from negotiating a common law settlement.

The effect of the current provisions of section 92 needs to be retained in the amended Act in order to deal with the consequences of a settlement for a claim for damages. However, greater clarity is needed here. Currently the Act is unclear about employers' right to recovery of workers' compensation expenses out of damages received by a worker from a third party. A particular aspect of section 92 that needs addressing is the right of the employer to recover workers' compensation expenses in circumstances where damages are paid under an agreement rather than a judgment.

There is also what appears to be an anomaly in section 93(3) where WorkCover is nominated as the appropriate jurisdiction for determination of an employer's claim to be indemnified by a negligent third-party. It also says such an application to WorkCover would have to be made in the first place by the worker. In practice, employers' recovery actions for workers' compensation are litigated in the District Court.

The Society's position is that:

- Section 92(f) serves an essential purpose in the current workers' compensation system in enabling a worker's statutory entitlements to be brought to an end where a common law claim for damages in which proceedings have been issued has been settled by deed. There is no inherent problem with section 92(f) requiring amendment;
- Rather than amending the section, the preferred option would be for the provisions of the Act relating to redemption of statutory liability to be amended (and broadened) so as to allow for the settlement of statutory entitlements in cases of disputed claims, whether or not there was an accompanying release of common law liability.

- Consideration needs to be given in a situation where the settlement agreement is in relation to a worker's claim for damages against a defendant only (ie. not the employer)? A Writ could be issued at any time since the constraints of the Act would not apply. The employer and workers' compensation insurer may however be interested non-parties to the litigation by virtue of having an interest in recovering Act benefits. Could an agreement to settle the damages claim which encompasses a workers' compensation recovery compromise not be registered? Specific provision needs to be made for settlements with non-employers and the compromise of workers' compensation recoveries.

## Part 8 – Scheme Regulation and Administration

### 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.*

The Society supports this proposal.

### Penalties

**P:179** *It is proposed all fines under the current Act be reviewed and incorporated in the new statute.*

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

**P:179** - The Society's comments will be reserved until the legislative form of the proposal is made available for comment.

**P:180** - The Society supports this proposal.

### Infringement notice time frame

**P:181** *It is proposed the new statute enable infringement notices to be given within 24 months after the offence is believed to have been committed.*

The Society supports this proposal.

### Regulation making powers

**P:182** *It is proposed, where possible, heads of power for prescribing regulations are located in the relevant Parts of the new statute.*

The Society's comments will be reserved until the legislative form of the proposal is made available for comment.



Konrad de Kerloy  
**President**