SUBMISSIONS ON THE WORKERS' COMPENSATION & INJURY MANAGEMENT BILL 2021 (CONSULTATION DRAFT)

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A INTRODUCTION AND SUMMARY

1. Eureka Lawyers is a firm specialising in workers' compensation and personal injury claims. Our firm regularly represents workers at WorkCover WA (**WorkCover**), the District Court of Western Australia (**District Court**) and the Supreme Court of Western Australia (**Supreme Court**) in relation to workers' compensation claims.

2. We make these submissions in relation to the *Workers' Compensation & Injury Management Bill 2021 (Consultation Draft)* (**Draft Bill**).

3. The Draft Bill is based on the recommendations from WorkCover's Review of the Workers' Compensation and Injury Management Act 1981: Final Report, dated June 2014 (**Final Report**). It is essential to note that the review of the workers' compensation legislation in Western Australia commenced in 2009 as a two stage process[1]. The first stage of the review concluded with the passage of amendments to the *Workers' Compensation and Injury Management Act 1981* (**Act**) in 2011.

4. The passage of time is a relevant consideration as since the review commenced, over 12 years ago, and since the publication of the Final Report in 2014, there have been a number of new and nuanced issues in workers compensation. Furthermore, through decisions handed down in the District Court and the Supreme Court, workers' compensation law in Western Australia has changed and developed in the last decade.

B DEFINITION OF 'WORKER'

5. The Draft Bill provides a new definition of '*worker*' based on the definition of '*employee*' for Pay-As-You-Go (**PAYG**) withholding under the Commonwealth taxation legislation.

6. The Act currently defines '*worker*' as (our emphasis):

> **worker** does not include a person whose employment is of a casual nature and is not for the purpose of the employer's trade or business, or except as hereinafter provided in this definition a police officer or Aboriginal police liaison officer appointed under the

[1] Final Report, page 9, paragraphs [4] and [5].

Police Act 1892; but save as aforementioned, 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;

the term **worker** save as aforesaid, also includes –

(a) any person to whose service any industrial award or industrial agreement applies; and

(b) 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,[2]

7. It is plainly apparent that the proposed definition of '*worker*' in the Draft Bill would exclude a significant number of workers from being eligible to make a workers' compensation claim.

8. The definition in the Draft Bill is also inconsistent with the position at Common Law, which regards the level of control in a relationship as a primary indicator for establishing the relationship of employer/employee.[3]

9. The Courts have long held that the dichotomy between employer and independent contractor should continue to be determined by having regard to a range of factors which would indicate the relationship, chief among these being the level of control over the work to be performed.

10. This principle has been considered and applied in numerous decisions involving the definition of '*worker*' for the purposes of the Act.[4] For example, in *Omega Homes Pty Ltd v Jonce Koteski*[5] Commissioner McCann (as his Honour then was) stated at [8]:

[2] s5(1) *Workers' Compensation and Injury Management Act 1981* (WA).

[3] *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263.

[4] See for example *Hewitt v Benale Pty Ltd* [2002] WASCA 163 and *Murray v Danzas Pty Limited* [2002] WADC 173.

[5] C11-2008, 8 July 2008, unreported, (paragraphs [5]-[10] contain a detailed analysis of the law relating to the definition of a 'worker').

> The so-called "control test" looks to the degree of control which the employer is entitled to exercise over the worker: the greater the control the more likely the relationship is one of master and servant. The importance of the control factor lies not so much in its actual exercise (although that is relevant) as in the right of the employer to exercise it. The degree of control necessary to characterise a contract as one of service does not necessarily entail the employer having the right to supervise, direct or interfere in the actual performance of the contract work, particularly where the performance of the work calls for a particular art or special skill or individual judgement (see *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561, which related to a trapeze artist who was held to be employed under a contract of service). The control test is important, but it must be applied with flexibility.

11. On the question of who is a '*worker*', the Common Law has continued to develop as the nature of employment has evolved over the years. Particularly in the last decade, there has been a considerable rise of gig workers, independent contractors, contract workers, temporary workers and on-demand workers.[6]

12. Considering the eligibility of on-demand workers for workers' compensation the Report of the Inquiry into the Victorian On-Demand Workforce[7] stated:

> The Inquiry was informed that a delivery driver working for a food delivery platform sustained multiple injuries when struck by another vehicle. Following an investigation of the claim, it was rejected on the basis that the individual was not a worker under the Act. This decision, the Inquiry was told, was based on information provided by the platform that the worker was an independent contractor not working under a contract of employment.
>
> There are several reasons self-employed platform workers may not qualify under this test.
>
> Firstly, given the secondary nature of platform income for most workers, it is not clear that most non-employee platform workers meet the requirements around the extent to which their gross income arises from one contract over a 12-month period.
>
> Secondly, if the services provided by a platform worker who is an independent contractor, are construed as being performed for the benefit of third parties (the end

[6] Workers' compensation and the gig economy fact sheet, September 2021, Safe Work Australia.

[7] June 2020.

> user, not the platform), the worker is unlikely to meet the test's requirement to be covered by compulsory insurance.[8]

13. Currently, the only Australian jurisdiction which utilises a definition of '*worker*' based on the definition of a PAYG employee, is Queensland.[9] All other jurisdictions apply much broader definitions of '*worker*' in order to encompass independent contractors and other on-demand workers.

14. The Queensland Government commissioned a review of the Queensland workers compensation scheme, which is detailed in the 2018 report titled The Operation of the Queensland Workers' Compensation Scheme (**Queensland Report**)[10]. The Queensland report considered the definition of '*worker*', stating (our emphasis):

> Two related factors help explain the extent to which 'independent contractors' feature in employment: the growth of the employer drive for flexibility, and the emergence of new forms of corporate organisation of work (referred to most conveniently as 'not there' employment) to minimise costs and avoid responsibility for some of the labour costs they would otherwise incur. 'Independent contractors' typically are subject to Workplace health and Safety legislation but are not entitled to workers' compensation or other employee benefits. They have inferior occupational health and safety (OHS) outcomes to ordinary, direct employees. There are potentially adverse effects not only for contractors but also, in cases of deaths, for their families, who find it hard to comprehend how that person's employment situation could have such significant implications.

15. That Queensland Report went on to state (our emphasis):

> The desirability of drawing extra groups of people into the protection of worker's compensation legislation is long standing, and reflects the fact that it is not just employees who warrant the protection of beneficial legislation. However, the labour market has changed more rapidly than the definitions of worker. Hence many of the current deemed occupations are more relevant to the industries that were prominent in the mid-20th century than the current services and information sectors employment most Australians. New South Wales for example still deems tributers, timbergetters, shearers' cooks, wrestlers and golf caddies, while Queensland deems shareframers

[8] Report of the Inquiry into the Victorian On-Demand Workforce, paragraphs [840] – [843].

[9] Comparison of workers' compensation arrangements in Australia and New Zealand, 2019, 27th Edition, Safe Work Australia, s 11 *Workers' Compensation and Rehabilitation Act 2003* (Qld).

[10] The Operation of the Queensland Workers' Compensation Scheme, 27 May 2018, Professor David Peetz.

> to be covered – though only if they do not provide and use mechanical farm machinery – but excludes deckhands on fishing boars if they are paid a percentage of the catch.[11]

16. The Queensland Report ultimately recommended that the definition of '*worker*' be amended so that it is not based on a PAYG employee. It further rejected any definition which would "*rely on the ATO definition of 'worker' to determine workers' compensation coverage*".[12]

17. Instead, the Queensland Report recommended that the definition of '*worker*' (in the Queensland legislation) be redefined to "*encompass those who work under agency arrangements, and require payment of premiums by the intermediaries or agencies*". In that regard, the report stated:

> This is the preferred option.
>
> Under this option coverage would be extended to people engaged to perform work under an agency arrangements where an employment relationship is not created with another party, and responsibility for premiums would go to the intermediary organisations' or agencies' that hire them. An example of such a definition would be:
>
> > A person engaged via an intermediary or agency to perform work under a contract (other than a contract of service) for another person [13]

18. The detailed analysis and recommendations in the Queensland Report are instructive with respect to the definition of '*worker*'. In circumstances where the definition of '*worker*' proposed in the Draft Bill is in conflict with the Common Law position, and the only other jurisdiction to have adopted such a definition is now looking to significantly amend it, the new legislation should adopt a similar definition. At the very least, the proposed definition in the Draft Bill should not be adopted.

19. For the reasons detailed above, it is our submission that the new definition of '*worker'* based on the definition of a PAYG employee should not be adopted. Instead, the definition should be expanded in order to encapsulate workers in the rapidly changing labour market, including on-demand and gig economies.

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[11] *Ibid*, page 17.

[12] *Ibid*, page 102.

[13] *Ibid*, page 105.

C CONSENT AUTHORITY

20. The Draft Bill provides that a worker must provide authority for the collection and disclosure of all relevant information in relation to the injury, the workers' compensation claim and injury management.[14] It is also intended that the authority cannot be revoked by the worker, at any stage.

21. While it is unnecessary to address at any great length, much could be said about the logical inconsistency of mandating a '*consent*' authority, which by its very definition is given of one's free will.

22. While the Draft Bill does state that the authority is intended for the purpose of collecting '*relevant'* information, it presupposes that it is the employer and/or insurer that will determine what information is relevant. As is readily apparent even from the most cursory review of the decisions of courts or tribunals on this issue, parties to a dispute often differ in views of what material is '*relevant*'.

23. In the current scheme, the consent authority, is a true consent authority and is not mandatory and can be revoked at any time by the worker. Where disputes arise between the worker and the employer/insurer about collection of evidence, the current Act contains provisions such as the power contained within section 193 compelling an entity to produce documents or materials.[15] The Arbitrator determines whether an order for production should be issued and whether it is reasonable.

24. In *Lysaght v Woolworths Group*[16], considering this issue, Arbitrator Fletcher stated (our emphasis):

> Third, I consider that I am fortified in finding that revocation of the Medical Consent Authority does not void or abrogate jurisdiction on the basis that;
>
> (a) Regulation 6A (2) (set out at [20] above) provides that the medical "Consent Authority" is "expedient for the purposes of the Act". By "expedient", I construe the legislation to meant that that provision of a "Consent Authority" is useful but

[14] s34, Draft Bill.

[15] Additionally, pursuant to sections 64 and 65 of the Act, an employer or insurer can compel a worker to attend upon a medical practitioner for the purpose of undergoing an assessment and obtaining a report.

[16] A53384, 16 January 2019, unreported.

not mandatory, albeit in circumstances where it is provided it "must be" in the wording in Form 3, and

(b) Where a worker has not provided, or has revoked a "Consent Authority", the Act makes extensive provisions for an employer to obtain medical evidence for the purpose of defending an application by a worker with respect to a claim made under s 57B(1) such as the Claim in this matter. This includes arranging medical reviews of the worker under ss 65 and 66 and seeking orders and under ss 193 and 194 requiring a worker's treating medical practitioners to produce documents such as clinical notes and medical records to an Arbitrator who then has discretion to disclose the documents to the employer.[17]

25. Allowing an employer or insurer access to medical and other records, by compelling a worker to sign an irrevocable consent authority, without any oversight by an Arbitrator, is contrary to long established legal principles governing access to documents. Those principles include:

a) that the documents sought must have at least some apparent potential relevance to the matters in issue or the dispute[18];

b) that prima facie there is some legitimate forensic purpose[19];

c) that the documents sought are '*apparently relevant*'[20]; and

d) that the party seeking the documents is not '*fishing*' (being not a legitimate forensic purpose)[21].

26. Section 188(2)(b) of the Act requires an Arbitrator to act according to equity, good conscience and the substantial merits of the case,[22] and in doing so Arbitrators are required to consider fundamental principles of law which helpfully guide decision makers, and such principles and rules should not be ignored.[23]

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[17] *Ibid*, at [42].

[18] *Darbyshire v Gilbert* [2006] WASCA 13, per Pullin JA at [13];

[19] *Ibid* at [14], *R v Spizzirri* [2001] 2 Qd R 686 at [24].

[20] *Alinta Sales Pty Ltd v Woodside Energy Pty Ltd* [2008] WASC 304, at [20]-[31].

[21] *Western Australia v Christie* (2005) 30 WAR 514, per McKechnie J at [519].

[22] Which provision is replicated in the Draft Bill, s 337.

[23] *McMahon Holdings Ltd v McKenzie* [2018] WADC 28, per O'Neal DCJ at [39]-[40]; and *CFC Consolidated Pty Ltd v Armet* [2020] WADC 85, per Wallace DCJ at [43]-[45].

27. The proposed changes in the Draft Bill would deprive workers, in circumstances where there is a dispute regarding access to medical documents, of the right to have an independent decision maker, the Arbitrator, determine whether the documents or records sought are relevant and whether the request is reasonable. It has been a long standing principle that a worker who did not sign a consent authority, or subsequently revoked that authority, was not deprived of accessing compensation under the Act.[24]

28. In our experience, employers and insurers will often seek to access medical records which are not relevant to the injuries claimed, often exceed the relevant time periods relevant to the claim and do so without the worker's knowledge. It is also the case that medical practitioners are unable to, or do not have the time, to trawl through voluminous medical records to determine what is relevant.

29. Furthermore, any report or medical documents which are obtained or accessed by the employer or insurer, using the consent authority, would be covered by legal professional privilege and therefore the worker would not be able to access those same reports or documents. This issue was considered in *Benn v Education Department of Western Australia*[25], where the employer (through its solicitors) obtained a medical report from the worker's treating general practitioner and then claimed legal professional privilege over the report.

30. Compensation Magistrate Packington went on to find:

> 13. None of the abovementioned provisions of the Act, in express terms, overcomes the privilege which the employer claims in respect of the medical report obtained by it from Dr Oi in February 2003.
>
> 14. The worker did not request a copy of the medical report before the worker's claim was referred for conciliation – indeed, the report appears not to have come into existence until after the matter was referred for conciliation. Neither did the report come into existence as the result of an examination required pursuant to s64 or s65. Assuming (and it appears not to be in dispute) that the report satisfies the general criteria for attracting legal professional

[24] *All Saints College v Carolyn Benedotti* [2009] WACC, C18-2009.

[25] CM-34/03 (13 May 2003).

> privilege, the employer would not, in the ordinary course of events, be obliged to comply with any requirement or direction of the review officer with regard to production of the report – see Chubb Protective Services v Eke (2001) WASCA 36.
>
> …
>
> 19. … Is there a necessary implication that thereafter a report obtained by the employer from a medical practitioner engaged by the worker should be treated any differently from a report obtained by the employer from a medical practitioner provided and paid by the employer? I am unable to discern one.[26]

31. The proposed changes in the Draft Bill, mandating that a worker sign an irrevocable consent authority, should not be adopted. The current regime, whereby an Arbitrator is the ultimate decision maker in relation to disclosure or production of documents, in any dispute, is satisfactory as it balances the interests of the worker and the employer in any dispute. The regime is also consistent across other jurisdictions, none of which mandate any such authority.

32. The proposed amendments would be inconsistent with the objectives of the Act[27], which are also mirrored at s 447(f) of the Draft Bill, to deal with disputes in a manner which is 'fair' and 'just', to both the worker and the employer/insurer.

D COMPENSATION PAYMENTS (STEP DOWNS AND CALCULATIONS)

33. Section 56(3) of the Draft Bill proposes to reduce an injured worker's rate of compensation payments to 85% of the calculated rate, after 26 weeks.

34. Currently, the Act provides that the rate of compensation for workers covered by an award or an industrial agreement, does not reduce to 85%.[28] Only those workers who are not covered by an award or an industrial agreement however, are subject to the reduction to 85% of the calculated rate of compensation, after 13 weeks.[29]

35. While it is correct that the Draft Bill will extend the period after which compensation payments reduce to 85%, the reduction will now also apply to all workers.

[26] *Ibid*, [13]-[19].

[27] s3, Act.

[28] Schedule 1, clause 11(3), Act.

[29] Schedule 1, clause 11(4)(a), Act.

36. The vast majority of workers are covered by an award or an industrial agreement. This includes some of the lowest paid and most vulnerable workers in society. Reducing compensation payments by 15% will have significant adverse consequences for the vast majority of workers who suffer from workplace injuries.

37. A recent study by Monash University considered whether step downs, which reduced the rate of compensation paid to injured workers, was as effective as return to work incentives.[30] The project was partially funded by Safe Work Australia, the Federal Government's statutory agency that develops national work health and safety workers' compensation policy. The study noted that step-downs were promoted in the 1980s and 90s as an incentive for claimants to return to work in order to reign in rising cost of insurance premiums. However, there is little evidence to support that claim.[31]

38. The study found:

> Step-downs have negative side effects on claimants. They have been linked to financial strain, which could worsen outcomes or even delay scheme exit, particularly later in the process. Further, economically-motivated return to work such as that driven by compensation benefits can increase the likelihood of reinjury.[32]

39. That study ultimately concluded (our emphasis):

> The findings suggest that step-downs have an anticipatory effect, leading some workers' compensation recipients to leave the system early in anticipation of a reduction in income. However, the effects are small and probably short-lived. Step-downs may still reduce costs to workers' compensation systems, which is a legitimate policy goal. However, our findings suggest step-downs have a marginal practical significance and are generally ineffective as a return to work policy initiative.

[30] Step-downs reduce workers' compensation payments to encourage return to work: Are they effective?, School of Public Health and Preventive Medicine, Monash University (July 2020).

[31] *Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015*, Department of Employment, Canberra, 2015, *and Independent Review of the Administration and Operation of the South Australian Return to Work Act 2014*, Australian Industry Group, 2018.

[32] See also: Why Pay More? The Effects of Increased Wage Replacement Benefits in Workers' Compensation, J Econ Lit, 2019.

40. It is also instructive to consider what the Courts have said with respect to weekly compensation payments, specifically when considering the sections of the Act referred to above. In *Ashfold v Metro Brick*[33], Owen J who gave the leading judgement said, at [16] (our emphasis):

> The general policy behind the Act is to provide a scheme to ensure that workers who suffer a disability in the course of their work are adequately compensated by their employers. The underlying principle is to provide the worker with a weekly compensation payment which reflects, as closely as possible, that amount the worker would otherwise have been earning under the relevant award. In other words, a figure is to be arrived at that neither over compensates nor unfairly prejudices the worker. In my opinion the only way of arriving at such a figure is to provide the worker with an amount that reflects what he was actually earning prior to the injury subject, of course, to the express exclusions. Such a figure ensures that neither the worker nor the employer is unfairly prejudiced as a result of the disability.

41. The reduction to 85% for compensation payments, as proposed in the Draft Bill, is inconsistent with both the Monash University study (commissioned by Safe Work Australia) and the position embraced by the Courts.

42. It is submitted that the reduction should be abandoned for both award and non-award workers. An injured worker's compensation payments should not be subject of any step downs.

43. It should also be noted that section 49(3) of the Draft Bill states (our emphasis):

> For the purposes of determining the amount of income compensation for any period during which the worker is partially incapacitated for work, the amount of income compensation that would apply if the worker were totally incapacitated for work must be determined as if that amount did not include any payments for overtime or any bonus or allowance.

44. With respect to section 49(3) of the Draft Bill, we repeat our submissions at [33] to [41], outlined above.

45. A worker's rate of weekly compensation payments should be calculated to reflect what the worker would have been earning, but for the work injury.

[33] Unreported, SC(WA), SCL 990171C, 58/98, 8 April 1999, BC9901722.

E ADMINISTRATIVE ACTION

46. The Draft Bill intends to expand the exclusion for psychological and/or psychiatric disorders, which arise out of '*administrative action*'. Whether intended or by coincidence, the section would replicate the exclusions in the *Safety, Rehabilitation and Compensation Act 1988* (**SRC Act**).

47. '*Administrative action*' is defined in section 7(1) of the Draft Bill. From even the most cursory reading of the definition, it is plainly apparent that the definition is so broad that it can capture most interactions between a worker and a superior, which ultimately result in the worker sustained a psychological injury and/or disease.[34]

48. In *CBA v Reeve*[35] the Full Court confirmed the reason why the '*administrative action*' exclusion was introduced into the SRC Act, stating at [73]:

> Here, the purpose of s 5A was to broaden the exclusion of matters from the previous definition of "injury" so that an employer would not be unduly inhibited in taking reasonable administrative action in respect of an employee's employment. The Parliament sought to ensure that an employer would be freer to deal with an employee, by taking disciplinary action or deciding to deal with that employee as an individual in respect of his or her employment, than had been the case under what it considered were narrow judicial interpretations of the old exclusion in s (4)(I).

49. What constitutes '*administrative action*', and whether workers' compensation claims are excluded for that reason, has been subject to significant litigation.[36] Those decisions will be binding on WorkCover and WA Courts, if the proposal in the Draft Bill is implemented.

50. In *Comcare v Martin*[37] the High Court heard an appeal in relation to a worker who claimed to have suffered a psychological injury in relation to bullying and harassment in her workplace. The Court found that the '*administrative action*' exclusion applies

[34] For example: s 7(1)(a) – counselling action (whether formal or informal); and s 7(1)(d) – disciplinary action (whether formal or informal).

[35] (2012) 199 FCR 463.

[36] In reference to the SRC Act.

[37] (2016) 258 CLR 467.

even if it is not the sole cause (ie. there are other causes of the disease), stating at [45] (our emphasis):

> When the exclusionary phrase is so read, it becomes apparent that an employee has suffered a disease "as a result of" administrative action if the administrative action is a cause in fact of the disease which the employee has suffered. The administrative action need not be the sole cause. There may be multiple causes, some of which might even be related to other aspects of the employee's employment. What is necessary is that the taking of the administrative action is an event without which the employee's ailment or aggravation would not have been a disease: it would not have been contributed to, to a significant degree, by the employee's employment.

51. The significance of the above decision is that even in workers' compensation claims where the injury is sustained as a result of bullying, if there is an element of administrative action[38] which contributed to the cause of the injury, the worker would be excluded from making a claim. It is inevitable that even in circumstances of bullying or harassment in the workplace, there will also be some type of administrative action taken by the employer.[39]

52. The current Act already excludes psychological injuries and/or diseases which arise as a result of employment related matters, including dismissal, retrenchment, demotion, discipline, transfer, any benefit in relation to the employment or an expectation of any such matter.[40] Expanding the exclusion to also include '*administrative action*' would undoubtedly result in claims, which would have previously been successful, being statute barred.

53. As an example, *Challenger TAFE v Shaban*[41] dealt with an appeal of a review officer's decision in favour of a worker who suffered psychological injuries in the course of his employment. The worker claimed that his psychological condition arose as a result of being required to teach particular subjects, to particular classes of students, which was outside his skills and expertise. The appeal was dismissed and the review officer's decision upheld.

[38] For example, in circumstances where there has been a 'counselling' or a 'disciplinary' meeting.

[39] For example, in investigating the allegations or making a determination.

[40] s5(4), Act.

[41] CM-62/04 (28 September 2004).

54. Challenger TAFE then further appealed to the Supreme Court. In dismissing that appeal, Templeman J stated, at [20] and [21][42]:

> It is submitted in relation to ground 1, that the decision below is attended with sufficient doubt on the basis that the respondent's illness resulted from an allocation of teaching duties that he did not want.
>
> In relation to the first ground it seems to be that the reasons given by the Compensation Magistrate to which I have referred provide a complete answer. It is really very difficult, I think, to improve on the way in which the Compensation Magistrate put it. In my view, rostering a teacher – in this case a lecturer (or the refusal to roster him) in a way which avoided the problem from which he suffered, could not be described as a benefit, or conversely, as a refusal of a benefit, for the reasons given.

55. Under the '*administrative action*' exclusion, the above dispute would have likely resulted in favour of the employer.

56. The '*administrative action*' exclusion should not be adopted, as the consequence of doing so would be to exclude a significant amount of workers, with genuine psychological claims, from accessing workers' compensation. The current Act already contains adequate exclusions for psychological claims under section 5(4).

F RETURN TO WORK AND REDUCTION/SUSPENSION OF PAYMENTS

57. The Draft Bill proposes to re-define '*return to work*' as either the worker returning to their pre-injury role or a return to suitable employment.[43]

58. The Draft Bill also defines '*suitable employment*' as employment with any employer, performing duties for which the worker is suited and it includes where the worker is working in a "*position created or modified particularly to be suitable for the worker*".[44]

59. The initial difficulty with that definition is that it potentially encapsulates return to work programs established with the host employer.

[42] *Challenger TAFE v Shaban* [2004] WASCA 314.

[43] s5, Draft Bill.

[44] s165, Draft Bill.

60. Furthermore, section 64 of the Draft Bill would allow an employer to discontinue compensation payments without the worker having an opportunity to oppose or object to that decision.

61. Section 64 should adopt an identical provision to that contained in section 65(2), which would allow the worker to make an application in relation to the proposed action.[45]

62. Section 162(5) intends to place an obligation on a worker to provide each progress certificate of capacity to the employer, or the insurer, within 7 days. The consequence of the worker not doing so, would allow an employer to make an application to suspend the compensation payments of that worker.[46]

63. Firstly, it is important to note that no such provision exists in the current Act. Secondly, the provision would be extremely onerous for workers. For example, not all workers have access to email or facsimile services and may therefore have to rely on Australia Post, which would undoubtedly take longer than 7 days. It is also the case that often workers rely on their general practitioner to send the medical certificate, together with an invoice, to the insurer.

64. The proposed section 162(5) should be abandoned.

G VOCATIONAL REHABILITATION

65. The current Act provides that vocational rehabilitation is an expense and can be claimed from the employer or insurer if it has been incurred, or likely to be incurred.[47]

66. The Draft Bill intends to reclassify vocational rehabilitation as a cost for which the employer is responsible.

[45] This submissions is also made with respect to section 66 of the Draft Bill.

[46] s159, Draft Bill.

[47] Sch 1 Cl 17(1a), Act.

67. While the difference may appear subtle, the consequence of adopting the proposed classification, as set out at section 159 of the Draft Bill, would have significant consequences for injured workers and the industry providers at large.

68. Under the current scheme, where vocational rehabilitation is an expense which the worker claims, the worker is able to choose and select their own rehabilitation provider. The proposed section 159(2) plainly allows the employer to establish the return to work program. The effect would be to deprive the worker of the ability to choose their own vocational rehabilitation provider.

69. The Draft Bill acknowledges that workers have the right to choose their own treating medical practitioners. The same right should extend to all allied health professionals, including vocational rehabilitation providers, who play a crucial role in an injured worker's rehabilitation.

70. Additionally, in order to maintain independence and impartiality, the vocational rehabilitation provider should not be directed by the employer, as contemplated by the Draft Bill.

71. If this provision in the Draft Bill were legislated, it would likely result in vocational rehabilitation being brought 'in-house' by most larger employers, which is already the case with most self-insured employers.

72. Vocational rehabilitation should remain an expense which can be claimed by the injured worker. The new legislation should also expressly provide that the choice of which vocational rehabilitation provider is appointed vests solely with the injured worker.

H COMMON LAW CLAIMS

73. The provisions in the Draft Bill, regarding a worker's eligibility to make a Common Law claim, are closely modelled on the current system.

74. Pursuant to section 93K(4)(a) and (b) of the current Act, a Court cannot award damages to a worker in respect of a compensable injury, unless the worker has made an election and that election was registered with the Director of WorkCover, in accordance with the Regulations. A worker is unable to make an election unless,

pursuant to section 93L(2)(b), the worker has been assessed as having a whole person impairment of at least 15%. Workers who are assessed as having a whole person impairment between 15% and 24%, can claim damages which are currently fixed[48] at $502,279.00[49] (which sum is inclusive of any payments the worker has received by way of compensation). For a worker to qualify for uncapped damages, they must be assessed as having a whole person impairment of 25% or more.

75. The process is overly onerous on workers, who are injured and often experiencing hardship. The whole person impairment thresholds, which the worker must satisfy in order to be able to access Common Law damages, are arbitrary and inconsistent with the thresholds for other claims for damages for personal injuries.

76. Namely, the *Motor Vehicle (Third Party Insurance) Act 1941* (**MVA**) sets a threshold for damages and non-pecuniary loss at 5%.[50] Therefore, a person who suffers injuries as a result of a motor vehicle accident, and subsequently seeks damages, is only required to overcome the 5% threshold.

77. Likewise, the *Civil Liability Act 2002* (**CLA**) also sets the same threshold for damages, more commonly known as '*pain and suffering*'.[51]

78. The effect of the current system is that it creates two classes of plaintiffs (claimants), those who are injured in the course of their employment and those who are not. A plaintiff injured at work, with an injury assessed at 10% whole person impairment, would not be able to claim Common Law damages. However, a plaintiff injured in a motor vehicle accident, with a similar injury, could access Common Law damages.

79. The effect of the Common Law thresholds under the Act, which are proposed in the Draft Bill, is to prejudice workers, purely because they were injured in the course of their employment. Such legislation, when compared against the MVA and the CLA, is manifestly unfair.

80. The Draft Bill should be amended to lower the whole person impairment threshold, to pursue a Common Law claim, to 5%, harmonising it with the MVA and the CLA. Therefore, those workers assessed as having a whole person impairment of 5% or

[48] s93F and 93K, Act.

[49] Indexation of Workers' Compensation Payments 2021/22, WorkCover WA.

[50] s3C, MVA.

[51] s9 and 10, CLA.

more, who are able to establish that they sustained their injuries as a result of their employer's negligence, would be able to make a Common Law claim.

I SETTLEMENT OF DISPUTED CLAIMS

81. Under the current Act, disputed workers' compensation claims may be settled, by agreement of the parties, pursuant to section 92(f) of the Act. Settlement is given effect by the worker commencing proceedings in the District Court[52] and a signed agreement being filed with the Director of WorkCover.

82. This process has been so standardised that on 21 June 2018 the *Legal Profession (Supreme and District Courts) (Contentious Business) Report 2018* was amended to include item 37, a stand-alone item which allows for up to 10 hours of work associated with effecting settlement pursuant to section 92(f) of the Act.[53]

83. The Draft Bill intends to effectively remove the possibility of settlement of a disputed claim by:

a) Requiring a worker to register a whole person impairment of 15% or more, before any such agreement can be registered;[54] and

b) Requiring that the employer accepts liability for a claim and at least 6 months have elapsed since the date of the worker's injury, before any settlement agreement can be reached.[55]

84. The provisions would prevent both workers and employers/insurers from entering agreements with a view of compromising disputes.

85. Effectively, where liability for a workers' compensation claim has been disputed, the worker would be placed in a perilous position of either abandoning the claim or making an application at WorkCover and litigating until a decision has been obtained from an Arbitrator.

[52] Which are then discontinued by consent of the parties.

[53] See also *Butler v Woolworths Group Limited* [2020] WADC 129.

[54] s152 and s420, Draft Bill.

[55] s148(1)(a) and (b), Draft Bill.

86. Inevitably, the result would be a significant increase in Arbitration applications, and further delays in obtaining a decision, as the parties to a dispute would be statute barred from reaching an agreement to compromise.

87. Furthermore, it should be noted that no other jurisdiction in Australia contains any similar provision, preventing settlement of a worker's compensation claim, in circumstances where the parties have reached an agreement.[56]

88. The District Court mandates that parties to a dispute attend a pre-trial conference, in order to attempt to reach an agreement and avoid further litigation.[57] Other jurisdictions have similar requirements.

89. It would be both a curious and an exceptional circumstance if the workers' compensation legislation in Western Australia were to prohibit, or at the very least significantly restrict, dispute resolution between parties to a workers' compensation dispute. Such a provision would not only be counterintuitive, but also counterproductive.

90. For these reasons the provisions in the Draft Bill which would prevent settlement of disputed claims, and restrict settlement of claims in general, should be abandoned in their entirety. The new legislation should contain a mechanism for both disputed and accepted claims to be settled, if an agreement is reached between the worker and the employer, or employer's insurer.

J RETURN TO WORK CASE CONFERENCES

91. The Draft Bill intends to introduce a compulsory return to work case conference, which the worker is required to attend, upon receiving notice from the employer, the employer's insurer or the worker's treating medical practitioner. Section 164(1) states (our emphasis):

> An injured worker who has an incapacity for work may be required to attend a conference arranged by the worker's employer, the employer's insurer or the worker's treating medical practitioner for the purpose of supporting the worker's recovery and

[56] Table 4.1, Comparison of workers' compensation arrangements in Australia and New Zealand, 2019, 27th Edition, Safe Work Australia.

[57] r39-40, *District Court Rules 2005.*

enhancing opportunities for the worker's return to work (a return to work case conference).

92. Firstly, it should be noted that the return to work case conferences are intended to apply to workers who are incapacitated for work. Implicit in the phrase '*worker who has an incapacity for work*' is a recognition that the worker is unable to return to work, by reason of an incapacity. A mandatory requirement compelling an incapacitated worker to attend a conference, arranged by an employer or insurer, regarding that worker's return to work, is inutile, to say the least.

93. Secondly, an employer and an employer's insurer are not qualified to contribute to a '*worker's recovery*', a process which under the current Act is managed by the worker's medical professionals.

94. Thirdly, under the current Act, return to work case conference are generally managed by the vocational rehabilitation provider, in consultation with the worker, the worker's general practitioner and the employer. A worker is not compelled to attend a return to work case conference, in circumstances where the worker is incapacitated for any work.

95. The current Act contains adequate provisions requiring a worker to participate in a return to work program, as well as powers to compel a worker to participate in a return to work program.[58]

96. The compulsory return to work case conferences should not be implemented in the new legislation and should be abandoned.

K DEEMED COMPENSATION PAYMENTS

97. The Draft Bill introduces an obligation on employers and insurers to make '*provisional payments*' to a worker, in circumstances where a decision on liability is deferred and subsequently not made within a prescribed time frame.[59]

98. It appears that these provisions are intended to replace section 57A in the current Act, which provides that an omission by an insurer to give a worker the statutory

[58] s155E, s156B and s157B, Act, see also *National Foods Ltd v Green* [2005] WASCA 180.

[59] s30 and s37-45, Draft Bill.

notice within 14 days enables the worker to weekly payments claimed and the insurer is liable to indemnify the employer in that regard.

99. It is a long established principle that workers' compensation legislation should be construed in a manner that is favourable to an injured worker.[60] Consistent with that beneficial purpose of the Act, the following passage from *Glover-Jackson v G & M Construction Pty Ltd*[61] per Malcolm CJ construes section 57A strictly in favour of injured workers to ensure that claims for compensation are processed promptly, stating (our emphasis):

> Section 57A was introduced into the Act in 1990. The purpose of the provision and related provisions was to ensure that employers did not delay in processing claims for works compensation by their employees. Hence the provision in sub (2), which enables recovery by the insurer from the employer where the employer sits on the worker's claim and does not make a claim against the insurer within the time specified. Action by the insurer is also required by subs (3) within 14 days after the employer has made a claim on the insurer under subs (2). The effect of s57A(5) is that, where the insurer fails to comply with subs (3) the worker is; by force of the subsection, 'entitled to the weekly payments claimed' and the insurer is liable to indemnify the employer in respect of them, 'but either the employer or the insurer may apply to the board in chambers for direction under subs (6)'. This, the entitlement under subs (5) is subject to the right of the employer or the insurer to apply for determination under subs (6) . . . In my opinion, when subs (5) and subs (6) are read together, the plain meaning of the words is that, on an application made on subs (5) the board is required to 'determine the entitlement would have had but for the operation of subs (5)'. In other words, ignoring the entitlement to the weekly payments by force of subs (5), what was the actual entitlement of the worker to weekly payments? . . . This, subs (6) provide that when the board determines the entitlement on the application under subs (5) 'the entitlement of the worker is as so determine by the board'. In other workers, as from the date of the determination entitlement of the worker to weekly payments is as so determined. Clearly the board may determine that there is no entitlement. Subsection (6), however makes it clear that the determination by the board cannot effect entitlement under subs (5) in respect of the period prior to the date of the boards determination. Thus, the worker may retain the benefit of any previous payments . . . In my opinion, if the board was satisfied that because of wilful misconduct of the time referred to in s 79 of the Act, it should refuse compensation, the board would be empowered on an application on subs (5) to determine under subs (6), when read with s 79 the weekly payments to which the worker was otherwise entitled under subs (5) ceased . . . Payments made before the date of the determination would stand.

100. The Court of Appeal endorsed this position in *McGowan v Castrum Pty Ltd*[62] stating that the purpose of section 57A in broad terms is to ensure that there is speedy processing of workers' companion claims.[63]

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[60] Wilson v Wilson's Tile Works Pty Ltd (1960) 104 CLR 328.

[61] WASC, No 1207/93, 30 March 1993, unreported, BC9301233.

[62] [2005] WASCA 198, at [4] per Wheeler JA.

[63] See also *The Cerebral Palsy Association of Western Australia Ltd t/as Ability Centre v Papalia* [2019] WADC 180, at [125] – [127] per Lemonis DCJ.

101. Unlike the current provisions, where an insurer is required to take action in relation to a claim within 14 days, the Draft Bill intends to extend the relevant period to 28 days.[64] Furthermore, the employer or the insurer are only required to make provisional payments until a liability decision is made.

102. The existing provisions under section 57A of the Act should be maintained in the new legislation. Those provisions were introduced in 1990 to ensure that processing of claims was not delayed and there is no reason why the provision should now be abandoned.

L REGULATIONS

103. Many of the provisions in the Draft Bill are dependent upon the Regulations, which are yet to be released. It is therefore difficult to understand or appreciate the impact or effect of the provisions, or how the Draft Bill is intended to operate.

104. To avoid uncertainty, less reliance should be placed on the Regulations, and the new legislation should clearly set out how it is intended to operate.

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[64] Information Sheet 11 states: "*prescribed day is likely to be 28 days after receiving the workers' compensation claim*".