Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Submission by Mark Civitella

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General	**I make this submission in my personal capacity as a solicitor who has acted in the WA workers compensation jurisdiction for employers and insurers continuously for the past 25 years.** **I support the initiative to modernize the WCIM Act, but consider further changes are required to the Bill as currently drafted to ensure the continued successful operation of the scheme.**
165	The definition of 'suitable employment' in clause 165 that includes 'modified duties that are created specifically to accommodate an injured worker's restrictions' will be overly burdensome on employers, particularly smaller employers. Whereas under the current scheme, a worker undertaking a GRTWP on restricted duties is still considered to be entitled to receive weekly compensation as they have not 'returned to work', the Bill suggests that 'income compensation' will cease for workers who have resumed pre-injury hours even if they remain restricted. This represents a significant departure from the current Scheme. It means that a worker on a GRTWP with the employer, doing pre-injury hours, will revert to wages. The only kind of 'suitable duties' that the Bill envisages do not warrant payment of wages is work that is 'token in nature' or does not involve 'useful work' (clause 165(4)). These terms are not defined, which creates a grey area that will require judicial interpretation. The effect of a worker going back onto wages instead of remaining on income compensation is that: 1. The employer ends up bearing the burden of workers with partial incapacity because they remain employed, on wages, but not capable of doing the job that they were employed to do. In effect, the level of "cover" for employers under the Scheme is reduced. 2. The prescribed amount for income compensation will be indefinitely preserved in the case of a restricted worker on pre-injury hours. Income compensation is much less likely to exhaust the prescribed amount than are weekly payments under the current Scheme. This is likely to result in longer duration claims, and claims being 'reactivated' many years later. Clause 165 should be re-drafted so as to legislate, in plain English, what occurs under the current Scheme. That is, the cessation of income compensation becomes appropriate when the worker is restored as a member of the wage earning workforce, capable of undertaking their pre-injury duties

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	with the employer, another real job with the same employer or other suitable employment in a labour market reasonable accessible to them. Another concern with draft clause 165(2) relates to the situation where the worker returns to work in suitable employment with a different employer. It is unclear as to how the employer at the time of the injury is supposed to verify what the worker is earning in the new employment. There is no new equivalent to the current section 59(5). Employers should be equipped with a means of obtaining wage details from a worker who has entered new employment and a specific form should be prescribed for this purpose.
148	The settlement pathway for a workers' compensation claim via a lump sum to discharge an employer's liability has been an important mechanism for resolving claims for many years and should not be overly constrained. While removing the current s.92(f) settlement method is appropriate given its contrived nature and the confusion it often causes, there still needs to be a means available to resolve disputed claims, preferably before they enter the dispute resolution system. In relation to the proposed limitations upon settlement that: - 6 months from the injury date must have elapsed; and - Liability must have been accepted, deemed to be accepted or determined, this is reasonable, provided there are several exceptions to this restriction. In many cases it is in the interests of both parties to enter into an early settlement, for example in psychiatric injury claims involving bullying or harassment. A 'return to work' in that situation can be detrimental to the health of the worker and to co-workers, in which case a negotiated settlement that also resolves the employment is in everyone's best interests and should not be prevented. Likewise, if an injured worker is planning on leaving the country permanently, or has a terminal illness, early settlement should of course be allowed. Also, to avoid too many disputes entering the Arbitration Service (which would result in an escalation of legal costs and delays), a Certificate of Outcome issued by the Conciliation Service should be a basis for allowing a settlement to proceed, even if the employer is not willing to accept liability.
64, 65	Subject to elevating the requirements for what constitutes 'suitable employment' as mentioned in the above submission concerning clause 165, the new mechanism in clauses 64 and 65 for reducing and discontinuing income compensation is appropriate. However, if the Bill's current definition of 'suitable employment' is retained, I envisage conflicts of interest arising between employers and licenced insurers. It will be in the insurers' interests to serve a notice under subclause (1) as soon as pre-injury hours on restricted duties are achieved, whereas the employer's best interests would dictate that no such notice is issued until the worker is unrestricted because the effect will be the resumption of wages and a resulting loss of productivity for which there is no indemnification. For clause 64(2) to function effectively, the employer must have some means of ascertaining from the worker their new income level. The addition of a provision like the current section 59(5) is recommended, along with a prescribed form that can be served on a worker which requires them to declare their earnings in the new employment within a stipulated time period, say 7 days.
160, 162 and 163	The current Act provision, section 156B, gives the employer the right to apply for an order by an arbitrator requiring a worker to participate in a return to work program. The proposed new clause 160 only gives the worker the right to apply to an arbitrator for orders in respect of a return to work program.

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	It is still necessary to have a provision that allows an employer to make such application. Clause 163 purports to give arbitrators the power to make orders that a worker comply with a duty under clause 162, but nowhere is it stated that an employer can make such application seeking orders. Clause 163 should include as the first sub-paragraph: (1) An employer may apply for an order of an arbitrator in respect of a failure to comply with a duty of the worker under section 162. In addition, clause 160 should include: (4) An employer may apply for an order of an arbitrator in respect of the content of a return to work program if, after consultation with the injured worker and the worker's treating medical practitioner, the content or implementation of a return to work program cannot be agreed upon. Further, there needs to be an express provision that applications by workers and employers with respect to return to work programs proceed directly to an arbitrator for interlocutory orders and bypass the conciliation phase. The ineffectiveness of current injury management provisions has primarily been on account of the time and costs of going through the process of conciliation when by its very nature the dispute is not one that is amenable to resolution by such means and the associated Scale costs are prohibitive.
20	This new provision is not supported as it is too onerous and unfair on employers. To impose a requirement that after becoming aware that a worker may have suffered an injury from employment, the employer must inform the worker in an approved form that the worker may have a right to compensation for the injury (with a potential fine of $5,000) is too vague and uncertain to apply. The use of language such as "*becoming aware*" and "*may have suffered an injury*" is highly problematic. What will it take for an employer to "become aware" and how is the employer to deduce whether or not a medical condition is possibly work-caused or work-aggravated? Often expert medical opinion is needed to determine causation. The provision may also encourage claims to be made that would not otherwise be contemplated by workers who have non-work related or pre-existing ailments.
69	The re-wording of section 62 (Review of weekly payments) is reasonable, however the omission from the Bill of an equivalent to the current section 60 (genuine dispute) is problematic for the Scheme. Sometimes a genuine dispute as to a worker's entitlement to income compensation would arise from evidence coming to light that does not meet the requirements of (current) ss. 61 or 62. To overcome this omission, clause 69 should be amended by removing the words "*having regard to the past or present condition of the worker*". That way, an arbitrator is fully empowered to review income compensation entitlements upon consideration of any relevant evidence, not just medical evidence.
7	From my experience, employers and insurers strongly support the expansion of the 'industrial exclusions' for stress claims. Stress claims have been increasing in prevalence and cost. Disputes relating to stress claims tend to be very complex and protracted. Most contentious for employers are those that arise from performance management and administrative actions. There is a need to reduce the number of workers' compensation stress claims, particularly those that are in actuality an industrial grievance. I support the new 'administrative action' exclusions but suggest the wording in the Bill be changed to the following so as to clarify what 'counselling action' entails, and also to encompass stress claims that relate to working directors. **7. Exclusion of injury: reasonable administrative action** *(1) In this section —* *administrative action includes any of the following actions and anything done in connection with—* *(a) an appraisal of the worker's performance;* *(b) disciplinary or counselling action;*

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	(c) the worker being suspended or stood down; *(d) reclassification or transfer of the worker;* *(e) a decision not to give a promotion to the worker;* *(f) a decision with regard to an application by the worker for leave;* *(g) a decision not to confer to the worker, or allow the worker to retain, a benefit in connection with the employment;* *and, if the worker is a working director –* *(h) liquidation or winding up of the employer;* *(i) solvency of the employer;* *(j) breach of, or any investigation into a breach of, a director's duty under any law.* ***disciplinary or counselling action** includes both formal and informal disciplinary or counselling action provided that it relates to the performance or conduct of the worker and is carried out by a person who is authorised by the employer to manage the performance or conduct of the worker.* *(2) A psychological or psychiatric disorder, including any physiological effect of the disorder on the nervous system, that a worker experiences is not an injury from employment if it results wholly or predominantly from —* *(a) administrative action, not being administrative action of a kind described in subsection (1)(a), (b), (c), (d), (e), (f) or (g) that is unreasonable and harsh on the part of the employer; or* *(b) the worker's expectation of administrative action or of a decision by the employer in relation to administrative action.*
34	The intent of this new provision is reasonable to the extent that: 1. The Act will automatically allow the collection and disclosure of relevant information about a worker when a worker makes a claim, doing away with the requirement for the worker to sign a Consent Authority on the claim form. 2. The authorization given by the Act cannot be revoked. However, the current wording of the draft clause is too narrow. The definition of 'relevant information' is vague and too limiting. It will block employers and insurers from gaining the information that is required for the purpose of making a decision on liability. The words "*relating to*" in clause 34(1) ought to be changed "*relevant to*". What is 'relevant to' a worker's injury will differ from one claim to another and should not become constrained by Regulations.
55 - 58	In my experience, all stakeholders see a need to simplify the methodology for calculating the rate of a worker's weekly payments. However, the proposed changes do not go far enough. There is no need for the new Act to make any distinction between Award and non-Award workers. All workers should be treated equally, and the 15% step-down after 26 weeks should apply equally to all workers. The 'base award rate' provision of clause 58 retains an unnecessary level of complication and inequity. The legislature should take this opportunity to make the weekly payment calculation process as straightforward as possible.
183	Clause 183, unlike the current s.70(4), does not require disclosure by a worker of a medical report by a medical practitioner chosen by themselves. This is an unsatisfactory change to the Scheme for employers and insurers. It promotes "doctor shopping" because reports unfavourable to a worker won't be required to be disclosed. In all fairness, given employers are obligated to disclose all medical reports to the worker, the same obligation should apply to injured workers.
163 & 184	The current provisions of the Act, s.72A and 72B, relating to a contravention by a worker of requirement to attend a medical examination and a contravention by a worker of requirement to participate in return to work program, are unwieldy and rarely used because of the dispute resolution system being unsuitable for dealing with these types of issues and because of the significant Scale costs that will apply when workers are represented. When issues arise with such contravention, speedy resolution is

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	essential. The Act should make provision for such disputes to go before an Arbitrator via an interlocutory process, without the need to first file an Application for Conciliation.
224	The new clauses 224 and 206 have the effect that if a principal can't prove that its contractors have a WC policy containing a principals indemnity endorsement then they must declare all of the contractors' workers' remuneration as if they were their own employees and be charged premium on such basis. This is an unnecessary burden to place on principals. If a contractor holds a WC policy, the provisions of clause 218 (former 175) will not operate. That is, there is no need for a worker to pursue a principal as a deemed employer if the contractor who employed the injured worker was insured. The worker's claim will just be made against their employer, being the contractor. That is the end of matter. Clause 218 doesn't come into play. There should be no difficulty with identifying who the employer of an injured worker is, particularly given the narrowing of the definition of 'worker'. It unnecessarily complicates the scheme to introduce the concept of a 'principals indemnity endorsement' and creates an additional cost for contractors who will likely have to pay extra for getting the endorsement added to their WC policy. However, the endorsement serves no real purpose – they hold a WC policy, so the principal should not be called upon. Potential costs aside, to require under clause 224 that a principal declare the remuneration of the employees of contractors is a significant administrative burden. On a large project, there can be a significant number of different contractors, and each of those contractors may themselves have a large workforce with varying numbers of employees dedicated to the principal's project at any one time. This seems extremely onerous. It should be enough for the principal to avoid having to declare contractors' employees' remuneration to simply be able to prove that each contractor holds a current WC policy. Clause 224(2) could be amended to read: *(2) A principal is not required to comply with a requirement under Clause 206 in respect of remuneration of a contract worker of the principal if the principal can show, upon applying for the issue or renewal of a workers' compensation policy, that the contractor who employs the worker holds a workers' compensation policy that is current during the relevant period.* Principals could be further incentivised to ensure all contractors hold WC cover by removing the principal's right of indemnity against the contractor under clause 220. If a principal engages a contractor and fails to ensure that the contractor holds WC insurance, what is the logic of allowing the principal to pursue the contractor for recovery of claim costs? The potential of having to bear the contractors' workers' claims themselves would make principals more vigilant about ensuring all contractors hold WC cover.
412	Clause 412(a) expands upon the existing s.93B(4) but is unnecessary and confusing. Who exactly is 'vicariously liable for the acts of the employer' is unclear and will require judicial interpretation. Inclusion of this provision could result in uncertainty for parties to workers compensation matters, particularly workers as to their common law rights.
NA	The draft Bill fails to include provisions that are the equivalent of the current sections 73 and 74. Sections 73 and 74 are important for workers, employers and insurers. They are intended to avoid uncertainties that might prejudice a worker where more than one employer or more than one insurer is involved in a claim. Some injuries occur over a period of time rather than on a specific date. Sometimes a business is taken over, resulting in a change in the employer of a worker, and often an employer will

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move its business from one licensed insurer to another. These are scenarios that need to be legislated for.

Whilst disputes under ss. 73 and 74 have not given rise to a great deal of actual WorkCover disputation over the years, the mere existence of these provisions has created a basis for insurers to resolve issues amicably and informally between themselves.

The expressions 'fresh injury' and 'the recurrence of an old injury' in the current provisions have caused some interpretation difficulties. They have never been very clearly defined, even with case law. The opportunity exists with modernisation of the Act to improve the readability and understanding of how these sections operate.

The table below sets out the current wording, along with the wording of suggested replacement provisions for the new Act.

The most appropriate location within the Bill for these provisions would be in Part 2 'Compensation for Injury', after clause 35.

So as to avoid confusion, clause 36 in the Bill (which deals with prescribed diseases and dust diseases) should become 38 and have its heading altered to make clearer what it is about. A better heading for clause 36 would be 'Claiming compensation for prescribed diseases involving more than one employer'.

Existing section 73	Recommended replacement
73. Worker entitled but dispute between employers (1) Where there is a dispute between employers as to liability but no dispute that the worker is entitled to compensation from some employer for a fresh injury or the recurrence of an old injury the employer of the worker at the time of the latest injury or recurrence is liable to pay compensation under this Act until the question of which employer is liable or how liability is to be apportioned between employers has been resolved. (2) The worker or his dependants, if so required by the employer first liable to pay compensation, shall furnish to him the name and address of any employer in whose employment the worker was when any like injury previously occurred, as he or they may possess. (3) If the worker has filed an application for compensation, the respondent employer shall join as a party any other employer whom he alleges is wholly or partially liable to pay the compensation.	**36. Apportionment of compensation between more than one employer** (1) In this section ***apportionable injury*** means: (a) a disease, or the recurrence, aggravation or acceleration of a pre-existing disease, that occurs over a period of time spanning a worker's employment by more than one employer; or (b) a personal injury by accident that results from a worker's continuous or repeated exposure to conditions that result in injury where such continuous or repeated exposure occurs during a worker's employment by more than one employer. (2) In this section the compensation payable in respect of an apportionable injury includes any provisional payments that the employer is or may become liable to pay under Subdivision 3. (3) The employer liable to deal with a claim and make payments of compensation in respect of an apportionable injury under this section is the employer who

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	(4) If the worker has not filed an application the employer first liable to pay compensation may apply for determination by an arbitrator of the question of whether some other employer is wholly or partially liable to pay compensation. (5) If an arbitrator finds that it was a recurrence and not a fresh injury or partly a recurrence and partly a fresh injury, the arbitrator may order that other employer to pay to the applicant employer the whole or a part of the amount of compensation paid to the worker and to pay any further compensation to which the worker is entitled. (6) If the dispute between employers is in respect of liability to pay compensation for noise induced hearing loss under section 24A or 31E, WorkCover WA shall provide an arbitrator dealing with the dispute with copies of the results of any relevant audiometric tests stored by WorkCover WA under clause 5(2) of Schedule 7.	was the employer of the worker at the end of the period of time in which the apportionable injury is alleged to have occurred. (4) If the worker makes an application for determination by an arbitrator of a question about liability for compensation pursuant to section 31 in respect of an apportionable injury, the employer liable under subsection (3) to deal with the claim may join as a party to the dispute any other employer it alleges may be wholly or partially liable to pay the apportionable compensation. (5) If the employer liable pursuant to subsection (3) to deal with a claim accepts liability to compensate a worker in respect of an apportionable injury, or becomes liable to make provisional payments, that employer may apply for determination by an arbitrator of the question of whether some other employer is wholly or partially liable to pay such compensation. (6) In an application made by a worker under subsection (4), or by an employer under subsection (5), an arbitrator may make an order requiring: (a) payment of compensation by any employer that is a party to the proceedings; (b) reimbursement of compensation by one employer to another employer where both are a party to the proceedings; or (c) the apportionment of liability to pay compensation between any employers that are party to the proceedings. (6) The employer liable pursuant to subsection (3) to deal with a claim in respect of an apportionable injury may request the worker to provide details of the worker's previous employers during the period of time in which the apportionable injury is alleged to have

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		occurred. The worker must provide such information in writing to the employer making the request within 14 days. (7) This section does not apply to claims for: (a) disease compensation as defined in section 38(1); or (b) noise-induced hearing loss. (**Note**: 38(1) is currently in the Bill as 36(1).)
	Existing section 74	**Recommended replacement**
	74. Worker entitled but dispute between insurers (1) Where a worker is entitled to compensation for a fresh injury or the recurrence of an old injury from an employer but there is a dispute between insurers as to liability to indemnify that employer, the insurer of the employer of the worker at the time of the latest injury or recurrence is liable to indemnify the employer until an arbitrator has otherwise determined. (1a) An employer or insurer may apply for determination by an arbitrator of a dispute between insurers notwithstanding any term or condition of any policy of insurance providing for some other means of settling disputes. (2) An arbitrator shall determine which insurer is liable or how liability is to be apportioned and may make such order as the arbitrator thinks proper for the reimbursement of one insurer by another and for the indemnity of the employer in respect of his liability under this Act.	**37. Apportionment of compensation between more than one insurer** (1) In this section ***apportionable injury*** means: (a) a disease, or the recurrence, aggravation or acceleration of a pre-existing disease, that occurs over a period of time during a worker's employment with an employer; or (b) a personal injury by accident that results from a worker's continuous or repeated exposure to conditions that result in injury where such continuous or repeated exposure occurs during a worker's employment by an employer, during which employment the employer was insured by more than one licensed insurer. (2) In this section the compensation payable in respect of an apportionable injury includes any provisional payments that the employer is or may become liable to pay under Subdivision 3. (3) The insurer liable to deal with a claim and to indemnify an employer in respect of any liability to pay compensation for an apportionable injury under this section is the insurer who was the insurer of the employer at the end of the period of time in

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		which the apportionable injury is alleged to have occurred. (4) If the worker makes an application for determination by an arbitrator of a question about liability for compensation pursuant to section 31 in respect of an apportionable injury, the insurer liable under subsection (3) to deal with the claim may join as a party to the dispute any prior insurer of the employer that it alleges may be wholly or partially liable to indemnify the employer. (5) If the insurer liable pursuant to subsection (3) to deal with a claim accepts that the employer is liable to compensate a worker in respect of an apportionable injury, or becomes liable by way of indemnity to make provisional payments on behalf of the employer, that insurer may apply for determination by an arbitrator of the question of whether some other insurer is wholly or partially liable to indemnify the employer. (6) In an application made by a worker under subsection (4) or an insurer under subsection (5), an arbitrator may make an order requiring: (a) payment of compensation by any insurer that is a party to the proceedings; (b) reimbursement of compensation by one insurer to another insurer where both are a party to the proceedings; or (c) the apportionment of liability to indemnify the employer between any insurers that are party to the proceedings. (7) The insurer liable pursuant to subsection (3) to deal with a claim in respect of an apportionable injury may request WorkCover WA to provide details of the employer's previous insurers during the period of time in which the apportionable injury is alleged to have occurred. WorkCover WA may, for the purposes of this

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		section, provide such information to the insurer upon request. (8) This section does not apply to claims for: (a) disease compensation as defined in section 38(1); or (b) noise-induced hearing loss. (**Note**: 38(1) is currently in the Bill as 36(1).)