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10 November 2021

WorkCover WA
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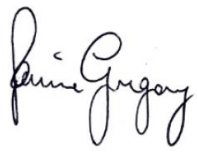
**By email:** consultation@workcover.wa.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the *Workers Compensation and Injury Management Bill 2021 – (Consultation Draft).*

Please do not hesitate to make contact if we can further assist with WorkCover's important work.

Yours faithfully,



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# Submission in Response to the *Workers Compensation and Injury Management Bill 2021 (Consultation Draft)*

**November 2021**

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## Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff nationally, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Since 2011, the Maurice Blackburn Perth office has been providing expert legal advice services in workplace injuries, motor vehicle accidents, medical negligence, will disputes, superannuation, employment and insurance, and other types of compensation and personal injury claims. Our Perth lawyers combine local knowledge with the expertise and resources of a national law firm.

## Our Submission

Thank you for the opportunity to provide feedback in relation to the consultation draft of the *Workers Compensation and Injury Management Bill 2021* (the "**Draft Bill**") and supporting documentation.

Maurice Blackburn congratulates the Government on embarking on the important process of modernising Western Australia's approach to workers' compensation. In our view, the current Act is outdated, and, in a number of areas, places workers at a disadvantage when compared to schemes in other jurisdictions.

In particular, we congratulate the Government on the following important enhancements:

- The embedding of NIIS and lifetime care for workers who experience catastrophic injuries, and

- The incorporation of important election commitments such as the increase in the point at which compensation payments step down from 13 to 26 weeks, the increase in the cap on medical and health expenses, and the prohibition on employers attending medical appointments.

We believe that the Draft Bill represents a more sustainable, yet worker-focused approach to workers' compensation and injury management than the current scheme.

There are, however, a number of areas within the Draft Bill which we believe require greater thought and scrutiny. In the pages below, we offer our suggestions for improvements to the draft, especially in areas where we believe the Draft Bill needs to better allow for changes in the Western Australian working environment, the changing accountabilities for employers, and the types of injury claims that are likely increase into the future.

All Maurice Blackburn contributions to public policy consultations are based on the lived experience of our clients, and the observations of Maurice Blackburn staff who serve them. To this end, we restrict our comments to those sections of the Draft Bill that directly impact our service provision.

## Our Responses to Selected Sections of the Bill

### 1. Definition of Worker

We note from Information Sheet 2[1] that:

> *The Bill provides for a new definition of 'worker' based on an 'employee' for Pay-As-You-Go (PAYG) withholding under Commonwealth taxation law. There will be flexibility for regulations to include or exclude specific work arrangements.*

Maurice Blackburn is concerned that the definitions of 'worker' and 'employer', as detailed in section 12 of the Draft Bill[2] are narrow, and leave open the opportunity for employers to side step their responsibilities by means of adjusting the nature of the employment relationship.

We further note from that Information Sheet that:

> *Regulations may bring other work arrangements under the Act by prescribing classes of worker and employer where no PAYG obligation applies.*

Maurice Blackburn sees the use of regulations as a means for ensuring coverage for classes of workers and employers as appropriate and sensible. As the nature of work and working relationships continues to change, it is important that the legislation and regulations remain flexible enough to ensure access to the scheme for those not in a traditional employment relationship.

The extended definition of a Worker in the current Act 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 whichever means of the person so working being in substance for his personal manual labour or services.*

Although the intention to simplify the definition is understandable, Maurice Blackburn considers that it is important that the proposed amendments *clarify* but not *narrow* the scope of workers entitled to be covered. We further believe that a 'catch all' provision in line with the definition (b) of the Act be included in the Regulations in order to ensure that the employers cannot avoid their obligation to insure the workers they employ simply by treating them as contractors.

We also note from Information Sheet 2 that:

> *At this stage there is no decision on whether on-demand workers will be prescribed workers in the regulations.*

[1] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Consultation-Draft-Bill-2021-Information-Sheets.pdf: P.5
[2] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Workers-Compensation-and-Injury-Management-Bill-2021-Consultation-Draft-Bill.pdf: p.13

The ongoing ambiguity in relation to the status of on-demand workers means that a large number of workers go to work every day with no guarantee that their medical treatment or loss of wages will be covered in the event of an injury at work.

As it stands, the losses sustained by injured on-demand workers are covered by State and Commonwealth, including through:

a) The Insurance Commission of Western Australia
b) Medicare
c) Centrelink where the person is not able to continue working
d) Public hospitals

This means that the often multinational employers of on-demand workers are costs shifting their overheads to the Australian taxpayers as they are not required to bear the cost of obtaining workers' compensation insurance to cover the people who do their work.

The lack of insurance cover does not mean that the costs of the injuries do not need to be paid, only that the costs are borne by someone else.

Maurice Blackburn draws the consultation's attention to the large body of work which is happening in this area across the country.

At the federal level, we note two important recommendations which appear in the first interim report[3] of the Senate Select Committee on Job Security:[4]

> *Recommendation 6*
>
> *The committee recommends that the Australian Government works with state and territory governments to lead the reform of state-based workers' compensation schemes so that they extend to platform workers, regardless of their visa or work status, and require platform companies to pay workers' compensation premiums for these workers.*
>
> *Recommendation 7*
>
> *The committee recommends that the Australian Government expands the definitions of 'employment' and 'employee' in the Fair Work Act 2009 to capture new and evolving forms of work. In addition to an expanded definition of 'employment' and 'employee' under the Fair Work Act, there should be a mechanism by which the Fair Work Commission can extend coverage of those rights when necessary to workers falling outside the expanded definition of employment, including low-leveraged and highly dependent workers so they can be provided with standards and protections under the Act.*

Maurice Blackburn urges this inquiry to ensure that its final decisions in relation to the definition of a worker, and the inclusion of platform workers aligns with these broader national initiatives.

We are aware that significant consultations on this issue have been conducted in other states as well.

[3] https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024635/toc_pdf/Firstinterimreporton-demandplatformworkinAustralia.pdf;fileType=application%2Fpdf
[4] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity

The recent report into Victoria's On-Demand Workforce[5], in relation to workplace insurances, found that:

- *There is uncertainty about accident and injury insurance, including the operation of WorkCover, for non-employee platform workers in Victoria.*
- *Some platforms provide insurance for workplace accidents and injuries but it is not always clear or obvious which work based activities are covered and these schemes may involve additional fees for the worker.*
- *Platform workers who work 'on the road' may be eligible for Transport Accident Commission (TAC) benefits, as would any Victorian who is in an accident involving a vehicle. It is not ideal that rideshare or food delivery workers in particular may be reliant on a default (transport accident) as opposed to worker designed scheme.*
- *It is evident that on-demand workers may be eligible under a patchwork of schemes.*
- *The outcome is that platform workers are often uncertain about insurance and may have inferior or inadequate insurance for work based injuries.*
- ***The Inquiry considers that the Victorian Government resolve any ambiguity around the operation of WorkCover for non-employee workers and ensure that platform workers receive appropriate protections.***
- *Greater clarity, consistency and simplicity in approach for 'work status' across different regulatory frameworks would reduce uncertainty. The Inquiry is cognisant that each regulatory framework has distinct policy imperatives. These factors should all be considered and balanced as part of a broader review of 'work status' across the statute books.*

Maurice Blackburn understands that a similarly ambiguous legislative environment exists in other states and territories in relation to whether gig workers are adequately covered by Workcover and other workplace insurances.

The impacts of failing to provide certainty of coverage can be devastating to gig economy workers and their families.

The impact of this is not only felt by the workers. The various state/territory Workcover schemes are being deprived of premium income they would otherwise have received. Governments may also be losing tax revenue from lost payroll, company and income tax as a direct result of misclassification of workers.

Maurice Blackburn notes that the Queensland government recently conducted an inquiry[6] into a possible extension of workers' compensation coverage to certain gig economy workers.

That inquiry resulted from a landmark report by Professor David Peetz on the operation of the Queensland Workers Compensation Scheme.[7] Chapter 10 of that report is dedicated to the changing nature of work and the gig economy.

The Peetz Report made several relevant recommendations, including:

*Recommendation 10.1:*

[5] https://engage.vic.gov.au/download_file/view/29834/2303; para 6.3.6, p.120 (our emphasis)
[6] https://www.worksafe.qld.gov.au/news/2019/submissions-invited-possible-extension-of-workers-compensation-coverage-for-certain-gig-economy
[7] https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0021/24087/workers-compensation-scheme-5-year-review-report.pdf

> *The coverage of the [Workers' Compensation and Rehabilitation Act 2003] should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Queensland at the time the work was undertaken.*
>
> *Recommendation 10.2:*
>
> *Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income reported by the intermediaries or agencies*

The resultant inquiry heard that in order to achieve the key objectives of Queensland's workers' compensation and rehabilitation scheme, the scheme must be extended to include those workers who currently sit outside its coverage.

Maurice Blackburn agrees with the following option, which was presented as the preferred option for change in the papers relating to that inquiry:

> *Amend the Workers' Compensation and Rehabilitation Act 2003 to extend workers' compensation coverage to gig workers and require intermediary businesses[8] to pay premiums.*

This proposed change is clearly in line with the recommendations made by Professor Peetz.

The provisions under this option, as described in the documentation, included:

- *That the Act would be changed to extend the coverage of the workers' compensation scheme to gig workers and consequently require intermediaries to pay workers' compensation premiums to cover the cost of this coverage.*
- *That workers' compensation coverage would only be extended to those defined as gig workers. That means that this option will only apply where the intermediary has a level of control or influence over the work, cost or conditions of work being performed by the gig worker.*
- *That gig workers would be deemed to be 'workers' for the purposes of the Act. The option could prescribe that a gig worker is a 'worker' by amending the Act to define a 'gig worker' as a person introduced by an intermediary to perform work under a contract (other than a contract of service) for another person.*
- *That the term 'intermediary' would be expressly defined in the Act to capture in-scope workers.*
- *That gig workers would have access to the same no-fault statutory workers' compensation entitlements and access to common law damages under the Act as a worker.*

Maurice Blackburn welcomes the commitment to equality of access to justice in the above provisions, and commends these provisions as worth of consideration for the Western Australian scheme.

[8] The RIS for that inquiry defined an intermediary business as a person, or a group of persons, who facilitates the introduction of a person to another person for the purpose of the first person entering into an agreement with the other person to do work for the person. This would include a platform used by workers to find work.

The key benefits of the above option to gig workers, as described in the inquiry materials, were listed as:

- *Fair and equal access to same level of compensation and access to common law damages for work-related injuries as workers.*
- *Improved timeliness of medical intervention for work-related injuries.*
- *Improved durable return to work outcomes.*
- *Improved work health and safety outcomes.*
- *Early medical intervention and enhanced benefits structures also improve secondary psychological impacts on the worker and their family.*

The Queensland inquiry selected the above option as its preferred model on the basis that it would:

- *protect gig workers who are particularly vulnerable by providing fair and equal access to workers' compensation rights and entitlements in Queensland;*
- *improve injured workers' chances of achieving a durable return to work following injury;*
- *support the flexibility offered by the gig economy (which is a strong driver of participation and job satisfaction of many gig workers), by not altering or limiting the way in which Intermediaries operate;*
- *provide a level playing field by ensuring gig businesses pay the same proportion of costs on workers' compensation as current employers pay in the industry that the intermediary is working in;*
- *reduce cost-shifting to the community—in particular, to the public health system or a worker's private medical insurance (if any) to recover from the injury; and*
- *result in improved work health and safety outcomes due to the incentivisation of workers' compensation insurance premiums to improve performance.*

The inquiry heard that any costs to business resulting from implementing the above would be relatively small, and that the imposition of those costs merely places intermediaries in line with businesses who are actually employing staff, thereby producing a market more conducive to competition.

Evidence would suggest that many of those who engage in the precarious and insecure work arrangements, mainly through lack of viable alternatives, are from the most vulnerable of Australian cohorts. They include people from immigrant communities (particularly those without residency or work rights), young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce.

Engagement in insecure work has moved from being a lifestyle choice for some, to being a last resort for many. While it may provide corporate Australia with flexibility and responsiveness, that comes at the expense of entrenching poverty and powerlessness, and widening inequality.

We urge this inquiry to align its thinking in relation to the definition of worker with the outcomes of similar inquires happing nationally.

## 2. Exclusions for Psychological Injury

We note from Information Sheet 6[9] that:

> *The current Act excludes stress related claims which result from various administrative actions (mostly disciplinary) undertaken by a worker's employer, or that are due to the worker not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment.*
>
> *The Bill extends this exclusion to any psychological or psychiatric disorder arising out of administrative action, as defined.*

Maurice Blackburn is uncomfortable with this proposed change.

We have long argued that there is an unfair and unacceptable difference in the treatment of workers who have experienced psychosocial injury and workers who have experienced physical injury by statutory compensation schemes.

The goal of any review of a workers' compensation scheme should, as a basic principle, strive to minimise the differences between how workers who have suffered a workplace based physical injury and those who have suffered a workplace based psychological injury are treated.

It is not clear on what basis there is a need to restrict the ambit of compensable psychological injuries based on the costs of the same, when there is no such drive to exclude the compensability of claims involving the types of physical injuries which are expensive to treat. In fact the Bill proposes an increase to the cap for medical expenses.

Maurice Blackburn considers that the approach adopted is not consistent and there is no reason why workers who have sustained a psychological injury should be treated differently to workers who have sustained a physical injury.

In our experience liability for psychological injury claims is more likely than not to be denied or permanently pended even when the evidence collated by the insurers supports the workers' claim. This enquiry proposes that the ability to settle disputed claims is to be restricted but with the psychological claims noted separately as a type of claim which should be excluded from these restrictions.

Workers sustaining a psychological injury are already being prejudiced by the way the insurers approach their claim and narrowing the scope further will prejudice these workers further.

In a number of other jurisdictions, the statutory legal test for psychological injury includes complicated explicit and implicit legal exceptions that can apply to exclude a psychological injury claim from being accepted as a workers' compensation injury. This is a higher test than for physical injury, across jurisdictions.

A number of these workers' compensation schemes contain a clause restricting compensation for mental health claims if the worker has been subject to management action – such as performance management or disciplinary action.

[9] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Consultation-Draft-Bill-2021-Information-Sheets.pdf: p.9

In our experience, the majority of behaviour that could be described as bullying and harassment reported to us is couched in language of performance management, regardless of how inappropriate the behaviour is. The reference to 'informal' administrative action as an excluded matter would severely limit the remedies available to workers who are ill-treated at work.

Also in our experience, it is not uncommon in these situations for witnesses to be reluctant to come forward to support a worker suffering a psychological injury such as the above, for a fear of reprisal by their co-workers or their employer.

Appeals processes for injured people who have fallen foul of 'management action' clauses are complex, and the costs are prohibitive for most claimants.

The imposition of the additional barrier of 'management action' obviously treats people with a psychological claim differently from those making a claim for physical injury.

The 'Comparison with Current Act by Key Provisions' document[10] tells us that the current Act allows that:

> *A disease caused by stress [is] not an injury if it arises from worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment, the worker not being promoted, reclassified, transferred or granted leave of absence, or any other benefit in relation to the employment*

We believe that these current provisions are adequate in allowing for reasonable exclusions.

Moving toward embedding additional exclusions for management actions presents a situation where the workers' rights to claim are being unnecessarily narrowed.

Our fear, informed through experience in other jurisdictions which already have these measures in place is that employers seeking to avoid responsibility for providing a psychologically healthy workplace simply attribute injury as relating to the worker's performance.

If the goal of this provision is to reduce the number of claims for psychological injury, there are better, more worker-friendly ways to achieve this. A better utilisation of OH&S laws in holding employers accountable for the provision of a psychologically healthy workplace would be an appropriate starting point.

By utilising the existing occupational health and safety laws, the responsibility for taking action is shifted from the injured worker to the State. Employers who fail to do so are subject to the consequences, including investigation and prosecution under OHS legislation.

OHS legislation also places great weight on employee engagement in risk mitigation – in other words, if you see something, say something. Bystander reporting of psychologically damaging workplace practices, via an OH&S process, would be a powerful inhibitor of such behaviours.

[10] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Consultation-Draft-Bill-2021-Comparison-by-Key-Provisions.pdf: p.1

## 3. Settlement of claims

Information sheet 21[11] tells us that:

> *The Bill clarifies the settlement pathway from eligibility through to registration and scrutiny of settlement agreements.*

The Final Report of the Review of the Workers' Compensation and Injury Management Act[12] notes that:

> *There has been a general trend toward an increased use of the common law pathway to settle difficult statutory claims as there is minimal criteria and oversight. The use of the common law settlement pathway to settle statutory claims is due to a legal loophole in the statute and would not otherwise be available for statutory claims.*

While understanding the concern and the need to improve the way claims are dealt with by the insurers, Maurice Blackburn is not convinced that the proposed method of achieving this will be successful.

In our experience, there is a problem with insurers and self-insurers managing their portfolio by pending claims and then resolving them by settlement. For example, we often see situations where an insurer denies a claim but then agrees to pay a significant sum at conciliation to settle the claim.

This would indicate that they are using the option to delay/deny a claim as more of a case management function. The best interests of the injured worker are a secondary consideration.

The fact that significant amounts of money are paid by the insurers to resolve claims they have denied or pended suggests to us that they are aware that these claims are in fact compensable but they simply do not want to manage those claims in their portfolio.

The option of commutation of benefits to a lump sum, however, is highly beneficial to injured workers. It enables them to plan and manage their recovery more effectively, and removes them from the long-tail drip feed of benefits.

It is also common place for our clients to express their frustration over being 'in the system' and having constantly to engage with the insurers, their doctors and rehabilitation providers. In our view the freedom of a worker to choose to opt for a lump sum benefits should be retained. We do agree, however, that corrective action needs to be taken to compel the insurers and self-insurers to deal with the more complex and expensive claims in good faith.

By taking away the possibility to settle a claim, the Draft Bill will essentially take away the freedom of the workers to choose how to move on with their lives following an injury as a response to what appears to be an acknowledgment of lack of good faith in how the insurers and self-insurers deal with the claims.

Maurice Blackburn is of the view that a better way of dealing with the identified trend of pending and declining more costly claims by the insurers and self-insurers would be to direct

[11] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Consultation-Draft-Bill-2021-Information-Sheets.pdf: p.24

[12] https://www.workcover.wa.gov.au/wp-content/uploads/2014/Documents/Resources/Legislative/FinalReport_Legislative-Review-2013.pdf: paragraph 62, p.9

the policy response at the insurers and self-insurers acting without good faith, and not limit the options open for workers.

Further, there is an unintended consequence if all disputed claims must be litigated.

A worker who sustains an injury for which liability is admitted will currently remain in receipt of weekly payments while unfit and while he or she progresses back to full duties through restricted duties. A worker in the same role with the identical injury is significantly prejudiced if his or her claim is declined even if the matter proceeds to an arbitration and the worker is successful in establishing that the injury is work-related.

This is because the worker bears the onus of proving the extent of their earning capacity, and unless they are totally unfit for work this has an effect on the compensation they are entitled to even if the claim was wrongfully or spuriously denied by the insurer given their theoretical capacity for alternative duties.

This means that a worker with an admitted claim will receive weekly payments while doing light duties, whereas a worker with a denied claim faces the prospect of litigating their claim for months and then receiving less than full weekly payments due to having theoretical capacity for work.

This is the case even if the worker remains employed by the pre-injury employer, and even if their claim was found to be compensable in the end. Therefore, a financial incentive exists for insurers and self-insurers to litigate claims that ought to be accepted.

Maurice Blackburn considers that this loophole ought to be closed for claims which in the end are found to be compensable by an arbitrator.

Maurice Blackburn recommends that this inquiry revisit this section of the proposed amendments to the Act, with the view to ensuring that the efficient and timely delivery of benefits to injured workers is the main focus.

## 4. Reducing or Discontinuing Income Compensation – Return to Work

The Guide to the Bill[13], in relation to clause 64 tells us that:

- *Clause 64 requires an employer to give notice to a worker to reduce or discontinue income compensation payments based on the worker returning to work. The definition of 'return to work' and the meaning of 'suitable employment' have been clarified as part of these changes.*

- *The notice must specify the basis for the reduction or discontinuance with reference to the earnings of the worker and the amount, if any, of income payments that will be paid to the worker for any partial incapacity for work.*

- *If the worker has returned to work in suitable employment with some other employer, the worker's earnings in that employment must be verified. These provisions allow for an earlier reduction or discontinuation of income payments than the current Act whilst ensuring the worker is given clear notice as to the basis for the reduction or discontinuation of income compensation payments.*

[13] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Consultation-Draft-Bill-Guide-to-the-Bill.pdf: p.26

Information Sheet 23[14] tells us that:

> *An employer will no longer have to wait 21 days to reduce or discontinue income compensation payments when a worker has returned to work.*

This marks a change from the current section 61 of the Act, which states, in part:

> *…and a copy of the **certificate** (which shall set out the grounds of the opinion of the medical practitioner) together with at least 21 clear days' prior notice of the intention the employer to discontinue the weekly payments…* (our emphasis)

The current section 61 only refers to a 21 day notice period in relation to a notice which refers to a medical certification of capacity, not a notice which refers to a return to work. In our experience, many employers are currently not providing 21 days' of notice to workers when they are deemed to have returned to work.

Maurice Blackburn is supportive of measures which ensure that proper notice is given to injured workers in relation to any reduction or discontinuation of benefits.

Maurice Blackburn is also supportive of requirements which ensure that such a reduction or discontinuation can be contested. Information Sheet 23 goes on to say that:

> *A worker may apply to have the matter determined as a dispute. An arbitrator can make any order the arbitrator considers appropriate in the circumstances.*

Maurice Blackburn is pleased that these important protections have been incorporated into the draft.

We are concerned, however, that the 21 day notice period on reducing or discontinuing benefits does not apply to the proposed clause 64.

When returning to work, it is important that a reasonable period of time be allowed where the injured worker is supported while he/she returns to his/her previous role, or to 'suitable employment'. It takes time to determine whether the worker's is actually able to perform his/her role in practice and a 'return to work' does not therefore occur automatically when a worker is certified fit for pre-injury duties. The settled case law recognises this.

We are concerned that allowing employers to immediately reduce or discontinue benefits, before that suitability is established will be detrimental to the injured worker.

Consider the following case study:

> ***Case Study #1***
>
> *An injured worker returned to work after having to take a number of weeks' off from work due to an injury. On her return she was provided with lighter duties to ease her back to work and she was not undertaking her full duties.*
>
> *During the first swing of the worker's return to work, the worker was re-injured and rendered unfit*

[14] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Consultation-Draft-Bill-2021-Information-Sheets.pdf: p.26

> *The insurer pended liability for this injury and as a consequence the worker received neither wages or weekly payments.*
>
> *As she did not qualify for Centrelink payments she was unable to hold on to her housing and her family had to pay for her to relocate back to New Zealand.*
>
> *The worker has therefore lost their capacity to live and work in Australia as a result of this recurrence of injury at work.*
>
> *It was only after the insurer was approached about the reason that the worker's weekly payments had been discontinued after the re-injury that the insurer advised us that they considered that the worker had 'returned to work'. This is despite the fact that the worker had been in receipt of weekly payments prior to their return to work after weeks of absence and the fact that they were told to do light duties.*

The above is an illustration of how vulnerable workers are in the current system, where there is no requirement to notify the worker that the weekly payments are to be changed back to wages.

Clause 50 of the Draft Bill[15] states that:

> *If a worker who has an incapacity for work resulting from an injury resumes or attempts to resume work, and is unable, on account of the injury, to perform or continue to perform the work, the resumption or attempted resumption of work or the inability to perform or continue to perform the work does not prejudice any entitlement to compensation under this Act that the worker would otherwise have.*

In practice WCIMA section 84 is habitually ignored and cases where an attempt to return to work result in pended claims and loss of weekly payments and wages are not unusual.

Maurice Blackburn considers that the proposed legislation should contain a clear requirement of a notice of an intention to reduce/cease weekly payments based on a return to work, including a period of time within which a worker can dispute this decision. As it stands the proposed clause 64 does not appear to contain an immediate remedy for a worker to halt the reduction of weekly payments.

The Act already contains provisions enabling insurers to recover weekly payments for which a worker is not legally entitled, so a notice period would not prejudice the insurer. In any event, in cases where this would apply the worker, by definition, would already be back at work and a productive member of the employer's work force - so such a notice would not prejudice a reasonable employer if the worker has in fact returned to work.

Maurice Blackburn recommends that the proposed legislation require that clear notice be provided to a worker before weekly payments can be ceased under the proposed section 64, and that this notice include sufficient time to respond.

[15] https://www.workcover.wa.gov.au/wp-content/uploads/2021/08/Workers-Compensation-and-Injury-Management-Bill-2021-Consultation-Draft-Bill.pdf: p.33

## 5. Income Compensation Calculation and Step Down

Information sheet 13[16] tells us that:

> *The Bill clarifies and simplifies the method for calculating income compensation and delivers on a 2021 election commitment to extend the point at which income compensation payments step down from 13 to 26 weeks.*

Maurice Blackburn congratulates the WA Government on honouring its election commitment to change the step-down provisions from 13 weeks to 26 weeks. We also appreciate that the proposed changes will simplify the calculation process considerably. We also note the application of the base award rate as a safety net for award workers.

We are concerned, however, that some workers will be worse off under the proposed arrangements.

Under current settings, Award workers are based on award rate of pay plus any over award, service payment or allowance paid on a regular basis. The proposed changes would mean that for those workers whose employment does not involve overtime, their weekly payments will be reduced, when this is not currently the case.

Fundamentally, Maurice Blackburn opposes step-down arrangements, as they essentially penalise workers for being injured. The step-down rate most impacts those who need the most support. While the increase to 26 weeks is welcome, we believe that schemes which do not incorporate a step-down arrangement are, by design, more worker-focused.

## 6. Consent Authority

Information Sheet 10[17] tells us that:

> *The Bill provides for a new consent authority mechanism for the collection and disclosure of information related to a worker's injury to enable the injury, claim and return to work to be managed effectively.*

Maurice Blackburn agrees that it is not unreasonable to require the injured worker to provide informed consent to enable insurers and self insurers access to reasonable medical information about the injured workers' condition. It does, however, raise the question of what is reasonable, and who determines what is reasonable.

We also note from Information Sheet 10 that:

> *Regulations may allow for the form and manner of collection and disclosure of relevant information, along with limitations on the information that may be collected and disclosed.*

We urge the Government to ensure that regulations set strict boundaries around what is and what is not reasonable information for the insurer or self insurer to access.

In our experience (both in WA and in other jurisdictions), insurers can be very aggressive in the use of and in seeking to access records to deny someone compensation when such information is not relevant.

[16] Ibid: p.16
[17] Ibid: p.13

Our staff report that they constantly see insurers and self insurers asking for full medical files, with the clear intention of perusing those files for often historical notations, unrelated to the workplace, that may be used to obfuscate or derail the claims process. It is important that the regulations do not tolerate these 'fishing expeditions'.

It is also important that the question of 'what is reasonable' cannot be used as a vehicle to delay the processing of a claim through litigation by an insurer before the substance of the claim is even discussed.

We fear this could be exacerbated with greater unfettered access for insurers and self-insurers in a regime where consent is not clear.

We ask this inquiry to consider that having a claim to compensation should not mean you have to trade in your right to some degree of privacy.

## 7. Definition of Medical Practitioner and Health Professional

The Bill and supporting materials make regular reference[18] to terms such as Medical practitioners, practices, hospitals and health professionals. We note that in the Bill, the definitions of such terms are derived from the *Health Practitioner Regulation Law (Western Australia) Act 2010*.[19]

We are concerned that the definitions of health professionals in that Act may be out of date, potentially excluding services such as exercise physiologists, speech pathologists and other services regulated through professional bodies and other means.

We encourage this inquiry to satisfy itself that the definitions are contemporary and align with COAG's views on registration[20]. Such services are vital to assisting injured workers in their recovery.

## 8. Restrictions on access to Common Law Damages

Information Sheet 38[21] tells us that:

> *The threshold requirements for the awarding of damages will be the same as the Current Act: the worker's degree of permanent whole person impairment must be at least 15%*

We are disappointed that the current wholesale revision of the scheme does not include a review of the provisions which restrict the workers' access to common law damages.

In our experience, these provisions act as a blunt instrument for some injured workers.

For a number of employees – especially in labour-intensive industries that are particularly important to Western Australia such as mining – it does not take a major injury to render a worker permanently impaired to work in a manual role. The current restrictions, as they stand, do not allow for these circumstances in an acceptable way.

[18] For example, Information Sheets 10, 21, 28, 29, 30 and 31
[19] https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a146782.html
[20] Ref: http://www.coaghealthcouncil.gov.au/NRAS, and http://www.coaghealthcouncil.gov.au/Portals/0/CHC%20Communique%20110918_1.pdf
[21] Ibid: p.41

It is not unusual for our staff to see workers who are unable to return to work in the mining industry due to an injury with no avenue for seeking compensation for the loss of future earnings. Even non-major injuries can have a devastating effect on the families of the injured workers, especially in cases where the partner of the main breadwinner has stayed home to look after the home given the FIFO roster.

In our experience, often injured workers who are permanently unable to return to physical labour are left with no appropriate means of achieving recourse against their employer.

This has led to an anomaly within the current scheme whereby an employer, who has a higher duty of care under common law to provide a safe working environment for his/her workers, has, in effect, less accountability if they fail at that duty. There is no incentive to protect workers from injury.

There are already thresholds in place which prevent the courts from awarding general damages for minor injuries and there are steps which a defendant in any proceedings can take to protect themselves against the costs of litigation by way of offers of compromise.

Although the purpose of the provisions restricting access to common law damages is to limit the access to workers with more serious injury, the practical consequence of this is that we and other law firms are often encountering cases where insurers are refusing to pay for surgery which would put the worker's permanent impairment over the statutory threshold, even in cases where there does not appear to be any objective reason for the insurer to decline the funding of the treatment.

This leads to injured workers being needlessly left without the treatment they need, and often in significant amounts of pain, while their claims are litigated at WorkCover over a period of months.

An injured worker cannot issue proceedings without first recording a whole person impairment of over 15% and there is a three-year statute of limitation for suing for common law damages in Western Australia.

It is a common perception in the industry, certainly shared by Maurice Blackburn, that the current provisions which restrict the workers' access to common law damages are resulting in injured workers not being provided the treatment they need in circumstances where having this treatment may put them in a position to sue their employer.

Maurice Blackburn urges this inquiry to consider whether a parallel review of provisions restricting access to common law damages would be more in keeping with the aim of modernising the workers' compensation environment in Western Australia.