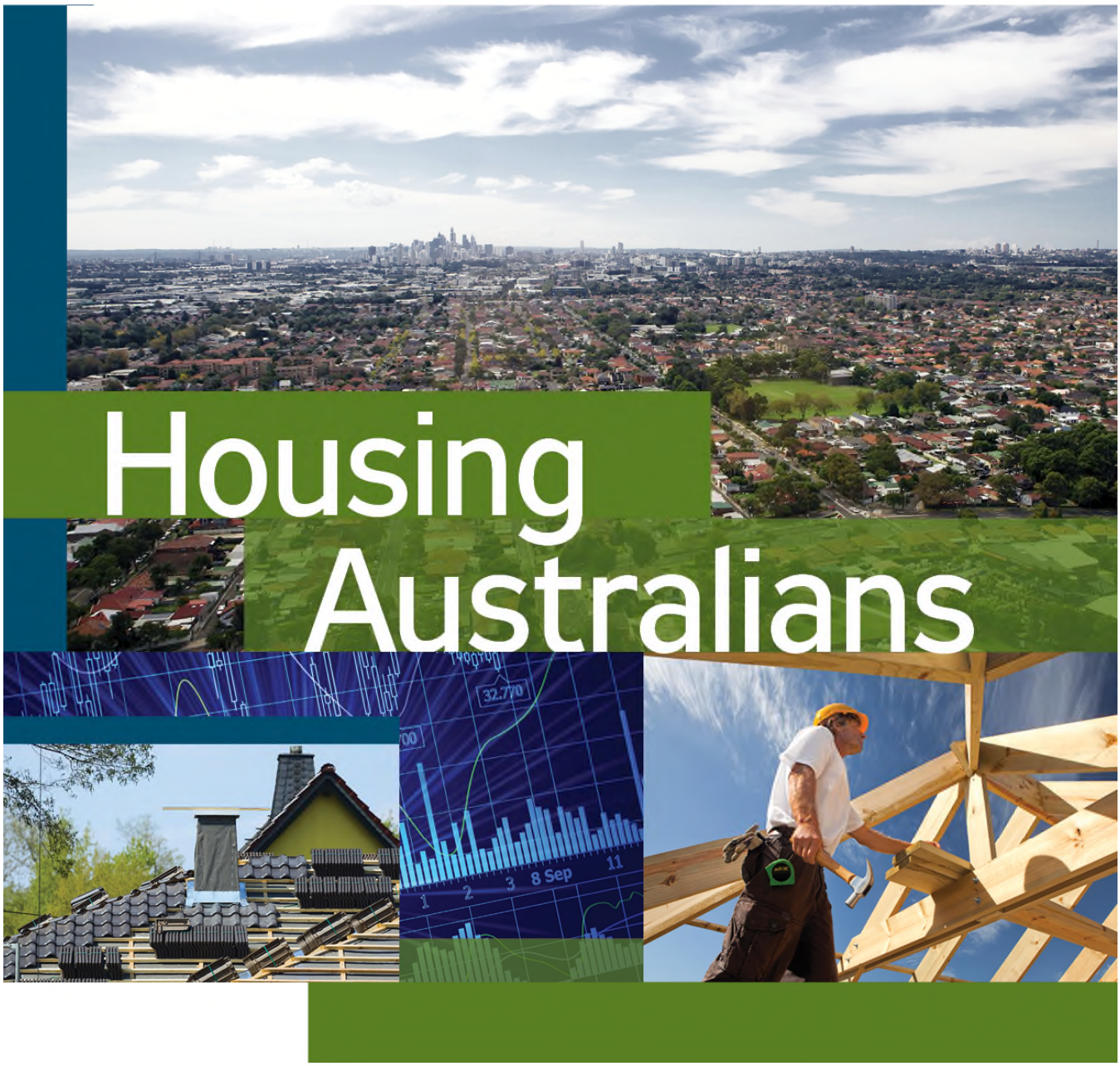
HOUSING INDUSTRY ASSOCIATION



Submission to WorkCover WA

Modernising WA's Workers Compensation Laws
Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

10 November 2021

HOUSING INDUSTRY ASSOCIATION

contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. Our members are involved in delivering more than 170,000 new homes each year through the construction of new housing estates, detached homes, low & medium-density housing developments, apartment buildings and completing renovations on Australia's 9 million existing homes.

HIA members comprise a diverse mix of companies, including volume builders delivering thousands of new homes a year through to small and medium home builders delivering one or more custom built homes a year. From sole traders to multi-nationals, HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into the manufacturing, supply and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

A review of WA's workers compensation laws has been underway since 2009. Driven by a number of election promises by the current Government in 2021, the *Workers Compensation and Injury Management Bill 2021 (Consultation Draft)* (the Draft Bill), was released by WorkCover WA on 11 August 2021 for public consultation.

In addition to the *Workers Compensation and Injury Management Act 1981* (Act), the Draft Bill proposes minor changes to the following:

- Civil Liability Act 2002
- Fire and Emergency Services Act 1998
- Insurance Commission of Western Australia Act 1986
- Motor Vehicle (Catastrophic Injuries) Act 2016
- Motor Vehicle (Third Party Insurance) Act 1943

A comprehensive suite of supporting documentation has also been released with the Draft Bill, including:

- the Guide to the Draft Bill;
- 58 Information Sheets;
- the Comparison with Current Act by Key Provisions; and
- the Comparison with Current Act by Section Number; and
- mark-ups of the Acts amended by the Bill.

The supporting documentation states that the WA workers compensation framework will remain largely the same. However, various key changes have been highlighted throughout the Draft Bill which will have an impact on insurance premiums and administrative processes for employers.

HIA takes this opportunity to respond to WorkCover WA's request for feedback on the parts of the Draft Bill that seek to amend the Act.

2. GENERAL COMMENTS

The residential building industry in Western Australian has recently seen an increase in activity beyond all expectations. This follows a five-year period of extremely low activity.

Labour and skills shortages have been the result of a previous reduction in capacity and restrictions on international travel. Material and product shortages have also arisen as a result global shipping and manufacturing challenges. Increased demand for scarce commodities has exacerbated these issues and prices have skyrocketed.

Builders who have entered into fixed price contracts with limited avenues to pass on the price increases they are experiencing, are now carrying a high level of financial risk. Further factors contributing to price increases include delays outside of the builder's control, such as approval of finance or permits. With delays also occurring within milestone progress stages, builders are required to carry progressive costs for the work for longer periods of time and milestone payments are being pushed back, putting pressure on their cash flow.

Currently, the residential building industry is not well-placed to be dealing with substantial additional legislative change or additional overhead costs.

2.1. INSURANCE PREMIUMS

WorkCover premiums are usually the largest single government on-cost for employers. Based on the proposed changes, HIA's biggest concern is the potential for significant increases to insurance premiums.

While many changes proposed don't materially impact the operation of the workers compensation laws, the proposal to increase the cap on medical expenses and extend the step-down period for income compensation are matters of concern. These two significant changes will undoubtedly result in an increase to insurance premiums.

The question remains as to whether the estimated 2-3% increase in premiums is a reasonable and accurate estimate. It is noted that WorkCover WA has had the cost impact of these changes assessed, however no evidence or supporting information for these figures appears to have been provided.

The initial impact of an increase in premiums will be felt by the employer, however in the residential building industry these costs are inevitably passed up the contractual chain. In a residential context, subcontractors pass costs on to builders, who then pass costs on to homeowners.

The result is a compounding of additional insurance costs in the contract price for a new home. This doesn't convert to an increase in the value of the home for the consumer, but instead results in reduced housing affordability. This cost is also not necessarily applied proportionately to the contract price and could see homeowners at the lower end of the market experiencing steeper increases than those at the higher end of the market.

Maximum insurance premium rates will not be prescribed under the new laws; however, a schedule of recommended rates for different industries and business categories will be provided. Where an insurer intends to charge in excess of 75% above the recommended rates, it will need to seek approval from WorkCover WA. This is in accordance with the current process.

In the same way that mining and resources construction is different to commercial construction, it is important for a clear distinction to be made between different construction types. For example, the construction of a single residential detached dwelling is very different to multi-residential construction, and similarly small-scale commercial versus medium-to-large scale commercial construction. The operating methods, site hazards and level of risk, are distinctly different between different construction types, resulting in entirely different injury outcomes.

Under section 256, WorkCover WA will be required to issue an industry classification order. This appears to be similar to the premium classification system under the current Act. If the current detailed categorisation of different industries and activities is intended to be maintained, this will provide employers with greater comfort with regard to the appropriate level of their premiums.

However, the inclusion of recommended premiums in legislation is a double-edged sword. Premiums should be calculated according to an appropriate risk assessment, including the safety record of the insured business. Setting industry-wide recommended premiums, although in some regards may appear to counter exorbitant price escalation in the market, can also work to drive premiums higher than what they would otherwise have been without legislative intervention. In fact, the use of building industry-wide ratings is one reason why members of the residential building industry face premium rates almost twice the all-industry average.

Further, under section 258, an insurer can charge over 75% more than the recommended premium rate for that industry classification, prior to the insured becoming eligible to apply for a premium review. This means that a 3% increase to the recommended premium rate could actually result in an unchecked increase of up to 5.25%. For example, in the case of a small residential builder, on a

policy with a premium of $20,000, this is an increase to the annual premium of $1,050. This is a substantial additional cost for a small business.

The inclusion of apprentice wages in the calculation of remuneration for the purpose of insurance premiums unfairly distorts the premium amount and acts as a further disincentive for employers to take on apprentices. It will be important to embrace the opportunity in the context of legislative reform, for the express exclusion of apprentice wages from the calculation of insurance premiums. This must occur in two ways; firstly in the calculation of the recommended premium rates under section 256, and secondly in the insurer's actual premiums.

Exclusion of apprentice wages in both sets of figures should be listed in either the Draft Bill or included in the regulations. An example of how this may work is in the NSW Apprentice Incentive Scheme, administered by icare. Under this scheme, employing an apprentice will entitle an employer to a reduction in their workers compensation premiums.

2.2. A REGULATORY IMPACT ASSESSMENT IS NEEDED

It is apparent that the changes to the legislation have been on foot for many years. They are also supported by WorkCover WA's Review of the Workers' Compensation and Injury Management Act 1981: Final Report (the Report), which included comprehensive industry consultation on the range of recommendations made.

However, the Report was completed in 2014; 7 years and several amendments to the Act since the release of the Draft Bill. In addition, the state government's election promises to double the cap on medical expenses and to double the step-down period for income compensation, do not appear to be captured in the Report. In fact, in contrast to the government's election promise, WorkCover WA recommended to retain the 13 week step-down period, despite submissions from various parties requesting the removal of the step-down provisions.

The only costing that has been investigated in the Report is in relation to changes to the entitlement for dependants of deceased workers. Further, a Regulatory Impact Assessment (RIA) has not been released with the Draft Bill, nor is it mentioned in the supporting documentation. It appears possible that the inclusion of the extended step-down period and increased cap on medical expenses, being a result of election commitments, have not been thoroughly reviewed or properly costed.

Financial viability and reasonable premiums are fundamental components of a successful workers compensation scheme. This means that accurately determining the associated costs for the proposal is critical to its ongoing success. Costs must also be subjectively assessed alongside the anticipated benefits of the proposed changes.

At this stage it is unclear whether the projected 2-3% increase in premiums will be realised. Without seeing the data behind the final figures, it is difficult to imagine how substantial changes such as the doubling of the step-down period for income compensation payments and the doubling of the cap on medical expenses could result in an increase of only 2-3%. HIA requests the release of comprehensive costing information to support the cost increase in insurance premiums of 2-3%.

The cost impacts of these changes should not be left to be tested once the Draft Bill has passed and the requirements are put to market. This approach could be catastrophic for businesses, particularly small-to-medium sized enterprises.

HIA strongly urges WorkCover WA to engage further with industry bodies, insurers and employers to determine more accurately any adverse impacts on scheme participants. If an RIA and associated key stakeholder and/or industry consultation has not yet been carried out in relation to these provisions, this should also be completed prior to inclusion of the provisions in the Draft Bill to be introduced to Parliament. HIA considers that before the Draft Bill is finalised, the impacts of these

provisions need to be ascertained and assessed, and a range of viable alternatives considered in a transparent and accountable way through a RIA.

2.3. CATASTROPHIC INJURIES SUPPORT SCHEME FOR WORKPLACE ACCIDENTS

Under the Draft Bill, the current Catastrophic Injury Support Scheme (CISS) that applies to motor vehicle accidents will be extended to cover workplace accidents. This will include lifetime care and support, as well as an entitlement to income compensation.

The CISS will be administered by the Insurance Commission of Western Australia. The effect of CISS will be to remove injured workers from the workers compensation framework and provide them with compensation under CISS.

A worker cannot have concurrent claims for workers compensation and under CISS. Involvement in CISS will have no impact on an injured workers common law rights. However, damages cannot be awarded for lifetime care costs while the injured person is a CISS participant. No limits apply to the awarding of other heads of damage.

Although the cost of injured worker participation in the CISS will be funded by an annual levy contribution by insurers and self-insurers via WorkCover WA, ultimately this cost will be passed on to the employer through insurance premiums. It is acknowledged that injuries of the severity required to participate in the CISS are very uncommon, it should also be acknowledged that the expansion of the CISS will have an impact on insurance premiums.

In the same way and for the same reasons that the increase to the medical costs cap and the doubling of the income compensation step-down period should be thoroughly assessed, so too should the impact of the expansion of the CISS to injured workers.

2.4. STRUCTURE AND LANGUAGE

The Draft Bill seeks to modernise the current workers compensation laws in WA. This includes a complete reorganisation of the structure of the Act, which had become increasingly challenging to navigate and to amend over time. HIA supports the reorganisation of the Act into a logical and clear format, and this appears to have come through in the structure of the Draft Bill.

HIA also supports the modernisation of the Act to remove outdated language that is difficult to understand. While this has been the case throughout the Draft Bill in most instances, there are some sections that would still benefit from further review and simplification. For example, the definition of working director under s.16, is unnecessarily complicated and is unlikely to be easily understood by most people.

> ***working director***, in relation to a company, means a company director of the company, whether or not the director would be a worker if this section did not apply —
>
> (a) who does work for or on behalf of the company; and
>
> (b) whose remuneration, by whatever means, as a company director of the company is in substance for personal manual labour or services.

Another example can be found under s.131 (2):

> A reference in this section to a child who is between 16 and 21 years of age is a reference to a child who has attained the age of 16 years but is under the age of 21 years.

It is preferable that plain language is used wherever possible to enhance the accessibility of the Draft Bill for its intended users.

2.5. USE OF REGULATIONS

The use of regulations is proposed to provide greater flexibility in many sections of the Draft Bill. It is suggested this will allow provisions, such as presumptive diseases and prescribed workers, to be more readily amended to suit the changing employment landscape. At face value, this is a reasonable proposition.

However, it is important that the push towards flexibility by using regulations does not undermine the integrity of the legislation. Legislation must not enable regulations to alter its operation.

Further, as with any significant changes to legislation, such as the introduction of regulations and any subsequent changes, a thorough industry consultation process must be undertaken out prior to any changes being made. As noted above, an RIA should be carried out for any provisions with potential cost impacts, as well as any proposed changes, to assess the cost-benefit ratio of any proposed changes prior to implementation.

2.6. CODES OF PRACTICE AND GUIDANCE MATERIAL

Codes of practice play an important role in providing guidance on how legislative provisions can be managed. They set the minimum standard of what is reasonably practicable, that can be applied by duty holders in all industries. They are also much more flexible than regulations and can be industry-specific where warranted.

However, codes of practice must not require duty holders to meet an additional or higher level than what is required by the legislative framework and they must not seek to alter the operation of the legislation.

HIA recommends that the act and the regulations are supported by a suite of industry-specific codes of practice and guidance notes to assist employers and employees in understanding and meeting their legal obligations. This is enabled under section 539 under the Draft Bill.

2.7. TRANSITIONAL AND SAVINGS PROVISIONS

Entitlements under the Act will automatically become entitlements under new legislation. There will be no revival rights where entitlements have been exhausted or extinguished under the Act. Approved providers will not need to reapply. HIA is supportive of these provisions.

The significant administrative and financial pressure felt by industry at present is likely to continue for several years. This is in addition to the combined impact of the changes underway to Work Health and Safety and Security of Payment laws in WA, in addition to ongoing change in the planning, building and environmental spaces.

Builders who have entered into fixed price contracts, sometimes up to two years ahead of starting the work on site, will not be able to pass on any increases in their insurance premiums to their clients. This is a substantial cost for builders to carry. For example, if a project is signed two years ahead of time, then takes another 18 months to build, this is a 3.5 year period before such time as the builder's capacity to build another home, and therefore pass on the insurance premium increase, becomes available.

Given the current circumstances under which industry is operating, and to ensure industry has enough time to adjust, HIA requests a transition period of at least 24 months from commencement of the new laws. This is particularly pertinent for self-insurers, who are responsible for understanding their workers compensation insurance obligations in finer detail to ordinary employers, in addition to their ordinary business requirements.

Alternatively, a staged approach may be appropriate, which would allow the most important change to be implemented first, followed by changes that are less impactful for scheme participants.

3. PART 1 - PRELIMINARY

3.1. SECTION 6 - INJURY

A compensable injury or illness must truly arise out of or in the course of employment, or the employment must have played a major or significant part in the development of the injury or disease. Injuries sustained by workers while travelling to and from work should not be included in any workers compensation scheme.

The definition of injury under the Draft Bill does not expressly exclude travel to and from work. It also states that a work-related injury arises while the worker is acting under the employer's instructions. Where an employer has instructed an employee to attend work at a particular site and the employee is injured during their commute, this could be construed as the worker having acted under the employer's instructions.

For the avoidance of doubt, HIA requests an express exclusion on claim arising out of travel to and from the location where the work shall be carried out.

3.2. SECTION 7 - EXCLUSION OF INJURY: REASONABLE ADMINISTRATIVE ACTION

Currently the Act excludes stress-related claims related to ordinary administrative procedures in the workplace, for example disciplinary procedures or where a worker is not promoted. This is also covered in the Draft Bill.

However, the Draft Bill expands on this exclusion to encompass psychological health impacts on a worker arising directly form, or from the expectation of, reasonable administrative action.

Reasonable administrative action includes:

- an appraisal of the worker's performance;
- counselling action (whether formal or informal);
- suspension action;
- disciplinary action (whether formal or informal);
- anything done in connection with an action described in paragraph (a), (b), (c) or (d);
- anything done in connection with the worker's failure to obtain a promotion, reclassification, transfer or other benefit, or to retain any benefit, in connection with the worker's employment.

The exclusion does not apply to administrative action that is unreasonable and harsh on the part of the employer.

Psychological and psychiatric health impacts can be multifaceted, are sometimes subjective and can be difficult to recognise and to diagnose. They may have one or many different causes, which are also difficult to determine. Whether or not the cause of a mental health condition was wholly or partly from the workplace would in most cases be uncertain. This section goes some way to addressing these issues in relation to workers compensation claims and provides the employer with some comfort in carrying out duties necessary for the running of their business.

However, given the recent focus on psychological health, and psychological injury arising from workplace behaviours and psychosocial hazards, it would be worth addressing this extremely challenging landscape within the proposed new workers compensation framework.

Factors outside of the workplace are often significant contributing factors to a person's mental health, meaning it can be difficult to manage and monitor in the workplace. Differentiating between the impact of the workplace and factors beyond the workplace on a person's mental health is an

incredibly delicate and complicated task. This was acknowledged by the Productivity Commission Inquiry into Mental Health, that notes:

> *'Although providing a mentally healthy workplace is important, it is only one component underpinning the mental health of an individual. The specific work-related factors that can impact on mental health need to be seen as part of a much larger group of risk factors to mental health that are outside the workplace.'*

A further complication unique to managing mental health is the interaction with other regulatory frameworks. Criminal laws, anti-discrimination laws, workplace relations laws and privacy laws all include limits on requesting information regarding mental health during the recruitment process. There is also no compulsion on workers to disclose information about their mental health if it does not affect how they do their job. This creates a range of impediments for employers and insurers that are difficult, if not impossible, to navigate.

It not always possible to determine if the workplace environment was contributory to a worker's psychological challenges. The Draft Bill should make it clear that employers have no responsibility for psychological injuries that have arisen substantially outside of the workplace.

The legislation could go further to provide a fair and reasonable approach to qualifying workers compensation claims. In line with the definition of 'injury' under s.6, there should be an obligation placed upon an employee to demonstrate that the psychological impacts arose wholly or substantially from the workplace. For example, a documented case of workplace bullying would likely be a genuine reason for a claim. The regulations could list deemed circumstances in which a psychological injury could be taken as having occurred in the workplace.

The regulations could also provide examples of psychosocial hazards that do not originate in the workplace, such as:

- external interpersonal, social or family conflict;
- difficult personal circumstances, such as worry arising from finances or health issues; and
- personal choices such as an unhealthy diet, drug use or poor sleep patterns.

It may also be reasonable to include further information in the regulations regarding reasonable psychological injury claims and any threshold measures that must be demonstrated prior to a claim for psychological injury being considered. This would need to be weighed up against whether the proposed steps are reasonably practicable to be taken given the nature of the potential injury and avoid prolongation of the matter in the event that the injury could be exacerbated.

These measures will go some way to providing the necessary clarity to insurers, employers and employees.

3.3. SECTION 10 - PRESCRIBED DISEASES TAKEN TO BE FROM CERTAIN EMPLOYMENT

A presumption of work-related injury provides workers with access to the workers compensation scheme without having to demonstrate that the disease was contracted in the course of employment.

This is appropriate when there is a high risk that the prescribed (presumptive) disease would be contracted at the workplace. Alternatively there may be a high likelihood of exposure to hazards both in and out of the workplace, such that it becomes too difficult to prove where the disease was contracted. The effect of the inclusion of presumptive diseases in workers compensation legislation that it becomes easier for a worker to make a claim.

Presumptive diseases and classes of employment are listed in the current Act, but will be relocated to the regulations under the Draft Bill. This is to provide additional flexibility, avoiding the parliamentary process, where circumstances can change relatively quickly.

An example of this is during the COVID-19 pandemic. In October 2020, the current Act was amended to include a presumption of work-related injury for COVID-19 contracted by healthcare workers. This was approximately 8 months from the beginning of the pandemic. However, if empowered, the regulations could be amended comparatively quickly.

The exception to this is the presumptive disease provisions for fire fighters who contract one of 12 cancers (cl.11) and workers who contract dust diseases (cl.113). These will be retained in the Act.

Although these diseases collectively are long-established as highly likely to be connected to employment, it is unusual that they wouldn't be included in the regulations for the purpose of consistency. This seems like a reasonable measure given that one of the key intentions behind modernising the workers compensation laws was to improve the ability to easily navigate and understand the legislation. To this end, HIA suggests locating all presumptive diseases in the regulations.

However, caution must be taken in incorporating an expanded list of injuries and diseases into the regulations. Any amendments made to the regulations should be subject to a proper process of consultation to determine the cost-benefit ratio of the proposed change.

Caution should also be taken in including COVID-19 or other viruses in this list. This type of inclusion should be assessed on a case-by-case basis. It is much more likely for a medical professional to contract an airborne virus during the course of their work than a residential construction worker. It is also much more easily connected to their actual work and environment. It would be unfair for employers to have to cover all claims for workers contracting COVID-19, as if it had occurred in the workplace and again, this would unnecessarily increase premiums.

3.4. SECTION 12 - MEANING OF "WORKER" AND "EMPLOYER"

A substantial change from the current Act is the move towards a modernised definition of 'worker'. All persons who are employees for the purposes of Pay-As-You-Go (PAYG) tax will now be covered as workers in the workers compensation scheme. This includes the following workers:

- employees;
- other workers, such as contractors, that the employer has voluntary agreements with; and
- businesses that don't quote their Australian business number (ABN).

The change in definition provides some clarity given the modern and widely understood definition of a PAYG employee. Consistency with other familiar legislation increases the likelihood that employers will comply with the workers compensation requirements and further, simplifies their business operations.

A unique characteristic of the building industry is the reliance on contracting arrangements for day-to-day business. Principals engage builders as 'head contractors', then builders engage subcontractors (trades), who may then engage sub-subcontractors (smaller organisations or sole traders).

Workers compensation is the responsibility of employers, not of principal contractors. While it is reassuring that most trades and subcontractors will not be captured under the workers compensation scheme, there are still some grey areas that remain. For example, the PAYG definition of 'employee' could include contractors. This may create uncertainty and ambiguity and potentially unnecessary duplication of insurance cover resulting in unnecessary additional insurance costs to industry.

HIA opposes the inclusion of any independent contractors under a builder's workers compensation obligations. An employer's obligation to hold workers compensation insurance should be limited to its genuine employees only. Independent contractors should be responsible for their own workers compensation insurance, where they are able to obtain it.

HIA supports a definition of worker that exempts businesses that satisfy the results test and Alienation of Personal Services Income (APSI) rules under the Commonwealth income tax laws. This is a key component in establishing and preserving contracting independence. Where a worker is found to be a genuine contractor, they should be exempt from coverage of an employer's workers compensation policy on the basis that they are obliged to have their own insurances in place.

3.5. SECTION 13 - PRESCRIBED WORKERS AND EXCLUDED WORKERS

The Draft Bill also broadens the PAYG definition in its use of prescribed classes of workers under the workers compensation scheme by their inclusion in the regulations. This includes the recently established class of gig workers or on-demand workers, who may not otherwise be captured by the PAYG definition.

The inclusion or exclusion of any class of workers must be properly consulted. However altering the definition under the Act, the benefits of utilising the PAYG definition (or other common definition or test) fall away and businesses will be exposed to greater uncertainty in the scope of their workers compensation coverage.

HIA is opposed to the use of the regulations to alter the definition of 'worker' under the Act.

3.6. SECTION 16 - WORKING DIRECTORS

HIA supports the continued exclusion of company directors from coverage under the workers compensation scheme.

However, HIA is opposed to the inclusion of working directors under the scheme. Persons running their own business should be responsible for purchasing and paying for their own sickness, accident and income protection insurance.

The express inclusion of working directors creates ambiguity around the broader exclusion of company directors. The distinction is made on the sole basis that the working director receives remuneration for doing work for the company.

The proposed requirement for the insurer to be notified of a working director at the time of taking out or renewing the policy (and presumably at any point in which a working director is appointed) allows for some scrutiny of the working directors that may be covered by the scheme.

However, if a company is minded to obtaining coverage for all directors, it may be possible for them to notify more than just those who are genuinely working directors, on the basis that the other directors also carry out work for the company and receive remuneration. The inclusion of working directors opens up the employer's ability to include a broad range of directors on the grounds that they are working directors. This is an unsatisfactory outcome.

4. PART 2 - COMPENSATION FOR INJURY

4.1. SECTION 20 - EMPLOYER MUST INFORM WORKER OF RIGHT TO CLAIM COMPENSATION

Section 20(1) requires an employer to notify a worker of their right to claim compensation within 14 days after becoming aware that the worker may have suffered a workplace injury. If the employer fails to notify within the required timeframe or in the correct form, they may be fined up to $5,000.

The timeframe for notification and the penalty for non-compliance with this section is excessive.

The workers compensation scheme is widely known. An injured employee is most likely well-aware of the existence of the scheme and their ability to make a claim for compensation in the event they are injured at work. While it is reasonable for the employer to notify the employee of their ability to make a claim, it is unlikely that a failure to notify by the employer will have a significant impact on the likelihood that an employee makes a claim.

Further, an employee has up to 12 months from the date they are injured in which they can make a claim. The failure of an employer to meet the 14 day timeframe or to advise in the prescribed form, will not have a substantial impact upon the employee's ability to prepare for or to make a claim at a later date. These requirements may be better addressed in a deemed-to-comply provision or under a code of practice, which sets out a way in which the employer, if carrying out the stipulated actions, is taken to have complied with the requirements of the section. This would not prevent them from meeting the requirements of the Draft Bill in another way.

4.2. SECTION 29 - INSURER OR SELF-INSURER TO MAKE DECISION ON LIABILITY

Insurers will be required to provide a liability decision notice or deferral notice within 14 days of lodgement of the claim. If the insurer is unable to make a determination within that time, they may defer by written notice to the worker.

In the event an insurer's response is deferred, a prescribed 'provisional payment day' will be listed in the regulations; likely to be 28 days from the date of the claim. This will be the day in which payments to the worker will start, regardless of whether a decision has been made by the insurer.

If no decision is made within the prescribed timeframe, likely to be 90 days from the date of the claim, the claim will be deemed to be accepted.

A distinction should be made between insurers and self-insurers. Insurers are generally companies whose primary and day-to-day business is insurance. They are well-versed in the operation of the law in relation to their products and keep up to date with any changes. However self-insurers are responsible for the day-to-day running of all parts of their business, which is usually not insurance. For a residential builder, the business focused on building homes.

There may be significant challenges faced by self-insurers with meeting the timeframes prescribed under the Draft Bill. It may be reasonable to provide self-insurers with a level of leniency or reduced impacts if they do not comply. They should not be subject to the same penalties as insurers.

There should also be no provision that provides for deemed acceptance of the claim, for example under section 29(6) and 30(3), in the event a notice is not given. A reduced fine and reporting procedure may be more appropriate as an incentive to comply.

4.3. DIVISION 2, SUBDIVISION 3 — PROVISIONAL PAYMENTS

The new provisional payments sections are not included in the current Act. Where an insurer or self-insurer defers or does not make a decision, the employer is required to make provisional payments to an injured worker for income compensation and medical expenses. If they don't, the employer faces a fine of up to $10,000.

The requirement to make provisional payments is problematic for employers. Many employers, and in particular those involved in the builder industry, are dependent on ongoing cash flow. They don't necessarily have substantial overdrafts that would allow them to carry potentially significant costs in the event of a worker being seriously injured. In some cases provisional payments may continue up to the deemed liability acceptance day, which will be prescribed by the regulations and is likely to be 90 days from the date of the claim.

While it is acknowledged under section 43 that an insurer shall indemnity the employer for any provisional payments made, the timeframe for payment to be made to the employer is uncapped. This does nothing to provide the employer with certainty as to the duration in which they will be required to carry these costs.

The timeframe in which the employer will need to start making provisional payments will be set by the regulations. The guidance material suggests this period is likely to be 28 days after the worker's claim has been received. At this time, payments are to be backdated to the first date the worker is unfit for work. In some cases, for example where the injury was sustained well before the claim was lodged, the first provisional payment amount could be a significant lump sum cost to the employer.

With provisional payments made the responsibility of the employer, there is currently no incentive for the insurer to make a timely assessment. A better arrangement would be for the insurer to be immediately responsible for making provisional payments in the event they do not make a determination within the necessary timeframe. Alternatively, the insurer should be required to make payments to the employer for provisional payments within a period of 14 days after the payments are made by the employer.

4.4. SECTION 46 - TERMS USED - EARNINGS

A worker's 'earnings' includes:

- their ordinary remuneration;
- overtime;
- any bonus or allowance; and
- anything other payments prescribed by the regulations.

'Earnings' do not include amounts for income compensation and any exclusions under the regulations.

The definition of **'**bonus or allowance' includes any bonus or incentive, shift allowance, weekend or public holiday penalty allowance, district allowance, industry allowance, meal allowance, living allowance, clothing allowance, travelling allowance or other allowance. This is an extremely broad definition.

Section 55(2) requires that a worker's earnings are averaged over the preceding year to determine their income compensation payment rate. This includes allowances as defined. However the breadth of the definition of 'bonus or allowance' means that allowances that are not guaranteed in the ordinary course of work are captured. This unreasonably distorts the calculation of the income compensation rate.

Specifically, some of the allowances listed in the definition are intended to be used for expenses the employee incurs during work hours or for working in a particular location. Examples of these allowances include meal allowances and travel allowances. When a worker is not working, they are not incurring any costs associated with these activities in connection with their work. Therefore, these allowances should not be included in the employee's income compensation payments.

In addition, bonuses are not always guaranteed income. They are usually paid upon the employee meeting or exceeding a particular target. Alternatively, they can be a percentage, based on the success of the company over the preceding period. They should not be included as a part of income compensation payments on the basis that the employee may not have been eligible to receive the bonus even if they had been able to work, or the amount of the bonus would not have otherwise been guaranteed.

The definition of 'bonus or allowance' should be restricted only to allowances that the employee would be paid, regardless of whether they were able to work. These include industry allowances,

living allowances and where an employee regularly works on a weekend or public holiday, the relevant penalty allowances.

4.5. SECTION 56 - AMOUNT OF INCOME COMPENSATION

The calculation of benefits must be clear and be 'stepped down' to meet return to work objectives and to ensure the viability of a workers compensation scheme.

The Draft Bill changes the established 13 week step-down period to 26 weeks. As discussed earlier in the submission, this is likely to have a significant impact on insurance premiums for employers. The extension of the step-down period also acts as a disincentive for an injured worker to return to work.

HIA requests the retention of the existing 13 week step-down period. In the event a worker is seriously injured and unquestionably requires an extended period away from the workplace, a provision can be included in the legislation to allow the worker to request an extension to the 13 week period, up to a maximum of 26 weeks. However, for most injuries the 13 week period should remain in place to encourage the worker to return to the workplace sooner.

Under subsection (5), the calculation of the pre-injury weekly rate of income may be adjusted where the worker would have been entitled to an increased (or decreased) rate of pay, had they been able to work. This may be reasonable based on changes to minimum or award rates. However, where an employee is being paid well above the minimum amount, the employer should not be required to pass on any annual or other anticipated pay rise during the period in which the worker is receiving compensation. This is a clear disincentive to return to work. This provision should be amended so that it is only applicable to income compensation at minimum pay rates.

4.6. SECTION 58 - MINIMUM WEEKLY RATE OF INCOME COMPENSATION

Unless otherwise specified, the weekly minimum rate of income compensation must be the greater of:

- the base applicable award rate; or
- minimum wage.

A step-down provision must be put in place for all workers. This is a necessary requirement to incentivise return to work and to ensure the viability of the workers compensation scheme. However, under this section, where a worker's full income compensation rate is already either minimum wage or the base award rate, they will not be subject to the step-down provision. This is also unfair to those that are ordinarily earning above award or minimum wage, who would be subject to the step-down provision.

A step-down amount of 85% should be applied for all workers under the workers compensation scheme. This provides certainty to employers and reduces the scope for error and non-compliance. A party may apply to receive a higher rate of pay under section 53 in the event they believe the standard 85% step-down this is unfair under their individual circumstances.

4.7. SECTION 60 - WORKING DIRECTORS

Further to comments made regarding working directors under Item 3.7 (section 16), proving the remuneration of a working director is also problematic.

As a part of gaining coverage for a working director under a workers compensation policy, a company must actively register the working director with the insurer. This includes the provision of a remuneration declaration. The declaration must set out the amount of remuneration to be or actually paid to the working director during the period of insurance.

However, there appears to be a conflict of interest in this process, and it may be more open to falsification than the process necessary for other employees, who do not have an interest in the company. In addition, subject to the performance of the company, the working director's earnings may fluctuate significantly.

It may be reasonable to introduce additional requirements to ensure the working director is legitimately a working director and in addition, the remuneration declaration is genuine. This may include providing copies of supporting documentation such as payslips, or a declaration from the company's accountant.

4.8. SECTION 62 - LEAVE WHILE ENTITLED TO INCOME COMPENSATION

At first glance it may appear unfair that an injured person is entitled to claim annual leave or long service leave during the period of injury under a workers compensation claim. However, as the principal income compensation will be paid by the insurer, the employer will only be responsible for paying for the employee's legal entitlements. This means that the employer is no worse off than if the employee was attending work.

In fact, it may be in the employer's benefit for the employee's absence from work to be concurrent to their injury period, as upon the employee's return to work, the employer will receive the benefit of additional time at work then what they would have had if the employee didn't use their leave entitlements.

4.9. PART 2, SUBDIVISION 4 — REDUCING, SUSPENDING AND DISCONTINUING INCOME COMPENSATION

Clarity has been provided in the Draft Bill regarding the circumstances in which an employer may reduce income compensation payments to an employee. These include medical evidence, return to work, to comply with a provision of the Draft Bill, for example, at the step-down period, subject to orders by arbitrators or conciliators, if the employee agrees, when worker is in custody or where a worker not residing in WA.

HIA is not opposed to this change.

4.10. SECTION 70 - TERMS USED

Under section 70 of the Draft Bill, the medical and health expenses general limit is defined as 60% of the general maximum amount. As a result of an election promise, this has been increased from the current cap of 30%. As detailed under Part 2 of this submission, HIA is strongly opposed to this change.

The general maximum amount is listed under section 537 as $239,179. This means a cap on medical and health expenses of 30% is a value of $71,754. To increase the cap to 60% would mean expenses can total up to $143,507. This is also subject to indexation.

The argument for this change is that the 30% cap can easily be reached in the event of a long stay in hospital or where multiple surgeries are required. Under the current scheme, the cap can be increased upon application in the event of a claim and according to WorkCover WA an application for an increase under these circumstances is rarely refused.

The increase in the cap under the Draft Bill to a value of 60% of the general maximum amount has been justified as a formalisation of the operation of the current scheme. Despite this, there has been no acknowledgement that an increase on application is perceived very differently by an insurer to a deemed higher cap on claims. This will undoubtedly result in an increase in premiums for no discernable difference in availability of the additional funds, where required. While HIA would ordinarily support a reduction in red tape, this change would result in unnecessary extra costs to industry and no significant benefit to employers or workers.

4.11. SECTION 72 - EXPENSES THAT ARE MEDICAL AND HEALTH EXPENSES

The Draft Bill includes a number of typical medical and health expenses, such as hospital bills, medicines and dental requirements. This is consistent with the current Act.

It also requires expenses that are medical and health expenses to be prescribed in regulations. The supporting documentation stipulates that in the first instance, these will be the services in the current Act that are not listed in the Draft Bill. These are predominantly allied health services.

This will allow for greater flexibility in adding, updating and removing services from this list, in addition to modifying description criteria. It will also improve the transition between the existing and new legislation where current claims transition between the two.

Expenses related to these services are regulated under clause section 73. Expenses may be fixed where deemed necessary under section 74, by Ministerial order. This allows for other Ministerial orders to be referenced where required. This seems to be a reasonable approach to a system that could become unnecessarily complicated. Arguably it simplifies the description and cost limitations for medical professionals. It is anticipated that this will decrease the margin for error and decrease administrative burden.

4.12. SECTION 79 - INCREASE FOR SPECIAL EXPENSES IN THE MEDICAL AND HEALTH EXPENSES GENERAL LIMIT AMOUNT

Under special circumstances a worker may make an application for a special increase to the general limit on medical and health expenses. Under section 79, this application may not be made outside of 5 years after the determination of liability.

HIA supports the inclusion of an express limit on applications to increase the general limit to ensure the employer and the insurer have some certainty as to the limit of their exposure.

4.13. SECTION 81 - EFFECT OF PARTICIPATION IN CATASTROPHIC INJURIES SUPPORT SCHEME

In the event of a serious permanent injury, an injured worker may elect to participate in the CISS. At this point, the employer will no longer be for medical and health expenses compensation. HIA supports the inclusion of this provision as it expressly prevents double claiming.

4.14. DIVISION 5 - COMPENSATION FOR MISCELLANEOUS EXPENSES

Uncapped miscellaneous medical expenses will be extended to include first aid and emergency transport. It is acknowledged that costs for services such as emergency air transport can be very high and would significantly impact upon the remaining available funds for other medical and health expenses under the specified cap. However, it is not expected that this service would be necessary for a large number of injuries.

The absence of limits upon emergency and first aid treatment may see a raise in costs attributed to the uncapped amount. Unchecked, unlimited costs would then flow on to increased premiums.

A limit to the amount captured under the cap would be reasonable, for example, $2000, which should cover ambulance transport in the metro area could be a more reasonable approach. Any costs above that threshold could be uncapped in the event of special circumstances such as air transport. Another option would be for the worker or employer to apply to have substantial costs associated with first aid or emergency transport excluded from the capped amount.

4.15. DIVISION 6 — LUMP SUM COMPENSATION FOR PERMANENT IMPAIRMENT FROM PERSONAL INJURY BY ACCIDENT

Division 6 is generally consistent with HIA's position that the use of lump sum payments should be limited and made only to workers who have a permanent total or partial impairment or loss of use of any part of the body.

This division sets out clear parameters as to the calculation of lump sum payments for permanent impairment, which have been simplified from the current Act. In particular, at section 98 a table is provided that sets out compensation in the event a worker sustains one or more injuries in a comprehensive list. In addition, section 100 specifies that the maximum compensable amount related to the permanent injury cannot exceed the general maximum amount. This provides certainty to insurers, employers and employees.

It also imparts upon the parties the freedom to reach an agreement as to the degree of permanent impairment, under section 102. In the event that they don't, section 103 requires that this is determined by an arbitrator. HIA supports this arrangement as it allows the parties to attempt to reach an agreement with which they are both comfortable, providing a more amicable outcome.

The provisions under Division 6 are also broadly reflected under Divisions 7 and 8, for noise-induced hearing loss and dust diseases, respectively.

4.16. DIVISION 11 - SETTLEMENT OF COMPENSATION CLAIM

Currently there are multiple pathways through which a workers compensation claim can be settled. The Draft Bill aims to streamline this with a single pathway for statutory claims and to reduce the notification requirements.

Following the assessment process, for the parties to make a settlement agreement under the Draft Bill, the agreement must be registered with WorkCover WA. This provides a clear process for all and reduces the opportunity for double claiming and the award of damages in relation to the same injury. It also allows for the settlement amount to be checked to ensure it is in line with the legislated amount.

In most instances, settlements can only be made 6 months after the injury date. This allows all parties sufficient time to see the full impact of the injury and to ensure that the settlement amount is appropriate.

There will be certain circumstances in which a settlement claim can be finalised prior to 6 months from the injury date, and a preliminary list of these circumstances is included in Information Sheet 21. While HIA recognises the need for early settlement in certain circumstances, we strongly believe this should only be in very narrow circumstances. The proposed list may be too broad.

An alternative to providing a lengthy list of circumstances could include several specific circumstances, such as certified imminent death, and the provision for an arbitrator to make a determination with regard to any other circumstances.

5. PART 3 – INJURY MANAGEMENT

HIA supports the rehabilitation of injured workers and return to work in a timely, safe and efficient manner. This should occur in a timeframe that aligns with the best interests of the employer and the employee.

5.1. SECTION 162 - DUTIES OF WORKER

A number of new duties will be placed on the worker under section 162. These include:

- Cooperating with the employer
- Participation in the establishment of a return-to-work program
- Comply with reason obligations, including workplace rehabilitation
- Attend return to work case conferences (section 164)
- Provide progress certificates of capacity

Employee engagement in the return-to-work process is fundamental to the proper functionality of the workers compensation framework. It is appropriate that this is a shared responsibility, rather than something that is put upon the employee by the insurer and the employer. This increases the accountability of the worker and improves the chances for active worker participation in the scheme. It also means that the process is more likely to be appropriate to the employee's limitations.

If a worker refuses to meet their return-to-work obligations, under section 163, they may lose their entitlement to workers compensation payments. HIA supports this provision.

5.2. Section 165 – Suitable employment

The definition of 'suitable employment' works alongside the definition of 'return to work' under section 5. The definition of 'return to work' requires that the injured worker returns to the position they held at the time of becoming injured, or other 'suitable employment'.

'Suitable employment' includes a position in which the employee can perform duties to which they are currently suited, taking into account a range of personal characteristics. This may be in a position that is has been modified or created to accommodate a worker's incapacity. Modifications may include the range or duties, location or working hours. The position must involve useful work and must not be token in nature, with regard given to the type of business.

Ambiguity arises in relation to the 'token nature' of the work. It is difficult to understand how this could be objectively determined by the employer in the first instance, then assessed in the event of a dispute. Whether or not a role or activity is considered token in nature could be subjective and may depend on the perception of the individuals involved. Further clarity should be provided to assist employers in making this assessment. This may be provided in the regulations or as a code of practice, or even as guidance material.

5.3. Section 167 - Host must cooperate with labour hire employer

It is integral that apprentice and employee hosts engaged in a labour hire arrangement participate in the return-to-work process. Although they are not the employer in this arrangement, they have critical role to play with regard to ensuring the work and environment are suitable for the employee based on their injuries. This is now expressly required under the Draft Bill.

HIA supports this inclusion.

5.4. Section 169 - Issuing of certificates of capacity

The Draft Bill provides clear requirements for the medical practitioner in issuing certificates of capacity. It is positive that these arrangements have been clarified, as it provides certainty to those involved in the claim process. The use of a prescribed form, although flexible, also has the benefit of adding consistency and transparency to the process.

5.5. Section 170 - Treating medical practitioner

Workers will be entitled to choose their own medical practitioner under section 170. The employer or insurer cannot require the worker to attend a medical practitioner of their own choosing but may elect to appoint a secondary medical practitioner to carry out a medical review. This is to be done at the cost of the electing party.

HIA has concerns with regard to the additional costs incurred by the employer as a result of this provision. While navigating the conflict of interest between medical practitioners appointed my separate parties is challenging, it is not necessarily insurmountable. To avoid both the conflict of interest and the additional cost of obtaining reviews, a system could be put in place that requires the parties to agree on a treating medical practitioner. Where the worker and the employer or insurer do not agree, they could make an application to WorkCover WA to appoint a treating medical practitioner, taking into account the requirements of both parties.

The treating medical professional is obliged to engage in all parts of the process, including the issue of certificates of capacity and the return to work process. This is a positive inclusion in the legislation as the ongoing input and support of the treating medical professional is integral to the operation of the workers compensation scheme, as well as the worker's recovery and return to work.

5.6. SECTION 171 - EMPLOYER, INSURER, AGENT OF INSURER MUST NOT BE PRESENT AT MEDICAL EXAMINATION

The WA Government promised as a part of the 2021 election that employers would be prevented from attending medical appointments with injured workers. This has been reflected in the Draft Bill.

Instead, all parties will be required to attend return to work case conferences, which must not be used for medical or liability determination processes. This may appear to prevent the employer or insurer from ensuring that there is no collusion between the medical professional and the employee. However, all parties are required to engage in the return-to-work process, which is held separately to the worker's appointments for diagnosis and treatment.

There appears to be a trade off for the employer in the transparency they would have had in attending medical appointments, and the more structured and inclusive return-to-work process. The employer and the insurer also have the option to obtain a second opinion with regard to the medical assessment with a medical practitioner of their own choosing. Despite HIA's concerns with regard to the additional costs associated with the duplication of medical reviews, HIA is not opposed to the compromise between attending the medical appointments and the return-to-work process.

5.7. SECTION 172 - PROVISION OF WORKPLACE REHABILITATION SERVICES BY APPROVED WORKPLACE REHABILITATION PROVIDER

The Draft Bill characterises workplace rehabilitation services as an injury management cost for which the employer is liable. This is a change from the current arrangements under which workplace rehabilitation expenses are compensable.

It is not clear why workplace rehabilitation is no longer compensable and it is difficult to understand why workplace rehabilitation should be characterised differently to any other compensable medical or health expense. It is an additional cost to the employer in connection with the worker's injury, that they wouldn't have had to bare in the event the worker was able to work. On this basis, the employer should be reimbursed for costs associated with this process.

To remove workplace rehabilitation, particularly when the service must be provided by an approved provider under section 173, goes against the intention of the workers compensation scheme, to ensure that employees receive the appropriate treatment to enable them to recover from their injury and recommence work, as best as possible.

Although there is a limit on how much the employer is liable to pay, this does not prevent the employer from trying to circumvent the process to avoid paying the full cost of the service. It also encourages service providers to charge above the stipulated threshold amount, as they know that the costs will be shared between insurers and employers.

A better way to approach this is for employers to have the option to claim for workplace rehabilitation under their workers compensation insurance. They then effectively have the choice whether they pay the costs themselves as they arise, or they pay the inevitable increase in premium that additional compensable costs include.

6. PART 5 - INSURANCE

The Bill maintains the fundamental employer obligation to effect and maintain a workers compensation insurance policy to cover workers suffering an injury from employment, clarifies the information required to be given to insurers, and provides for a new record keeping requirement.

6.1. SECTION 212 - RECORDS TO BE KEPT BY EMPLOYER

The new record keeping obligation on employers requires records to be retained for a period of 7 years, including:

- the number of workers covered
- the industry classification
- total remuneration paid or payable for each period of insurance
- any other relevant matters, such as claims history

The retention of this level of information over a period of 7 years is onerous. In some instances the frequent turnover of staff would mean records relating to number of staff at any given time would need to be continuously updated and retained. While smaller businesses may not feel the impact of this requirement, larger businesses would struggle to ensure it is met.

HIA requests a pragmatic approach is taken to record keeping, by reducing the required period of time to retain records to between 3 and 5 years. In addition, the number of workers could be recorded in a bracket, rather than an exact number of workers, for example, 1-10 persons, 10-25 persons, 25-50 persons, 50-100 person, etc.

6.2. DIVISION 3 — LICENSED INSURERS AND DIVISION 4 — SELF-INSURANCE

Once the new laws have passed, both insurers (section 229) and self-insurers (section 248) will be required to be licensed by WorkCover WA. This is an expansion of the current powers, which currently rest with the Minister. This allows for WorkCover WA to regulate insurers and self-insurers, to ensure compliance with the legislation.

All insurers transition over to the new act automatically.

HIA does not oppose these provisions.

6.3. SECTION 256 - FIXING OF RECOMMENDED PREMIUM RATES

Competition amongst insurers is fundamental to privately underwritten market and should be encouraged. Competition results in improvements in the quality of service being provided and will ultimately result in lower workers compensation premiums. Regulations should allow for free and open competition between public and private insurers.

The Draft Bill under subsection (1) requires WorkCover WA to make an industry classification order distinguishing between industries that have different insurable risks. Under subsection (2), WorkCover WA is required to set recommended premium rates of insurance, based on the industry classification order.

It is arguable that any intervention in the market has an impact on competition between insurers. Recommended premium rates are established as a suggestion of the amount an insurance policy should cost, which may be higher or lower than what the insurer would have otherwise set those

rates in the absence of the recommendation. For a truly competitive market, there would be no recommended premium rates included in the legislation.

6.4. SECTION 258 - REVIEW OF PREMIUM CHARGED

The Draft Bill does not include the current cap on insurance premiums of 175% of the recommended premium rate. Instead, it provides a streamlined process for an employer to appeal an insurance premium that is in excess of 75% of the recommended premium rate.

The use of a cap on insurance premiums is a double-edged sword. A cap on insurance premiums whether by the establishment of a fixed upper limit, or by the use of an appeal threshold, may appear to limit the market's ability to overcharge. However, where an insurer knows that they are able to charge up to a prescribed amount without contest, they may be more inclined to charge that higher rate, particularly when their competitors are doing the same.

It may be worth carrying out further investigation as to whether the strategy to constrain the market by using both recommended premium rates under section 256 and a review threshold, is an effective way of ensuring workers compensation insurance remains affordable.

7. PART 6 – DISPUTE RESOLUTION

7.1. SECTION 304 - AUTHORISED AGENT

Under the current Act, a person who is not a legal practitioner may be registered with WorkCover WA to represent a party in arbitration and conciliation schemes. These agents are referred to as registered independent agents.

Under the Draft Bill there will be a two-year transitional period for registered independent agents and upon expiry of the period, they will no longer be permitted to represent parties in workers compensation dispute forums. All other agents, such as agents appointed by insurers, associations and unions, will no longer be required to be registered and will automatically be permitted to represent parties.

The guidance material states that only a very small number of sole-trader independent agents are presently registered with WorkCover WA. It appears that the removal of this section is intended to reduce the administrative burden upon WorkCover WA for the registration of agents generally.

HIA has no objection to the reduction of red tape. The removal of the requirement to register pre-qualified parties, either on the basis of their professional qualifications or based on their employer appears to be a reasonable way to do this. However, preventing a party from engaging an independent representative, who is otherwise qualified and experienced in the representation of parties in workers compensation matters, but who does not possess a legal qualification or work for a prescribed employer seems unnecessarily restrictive.

It may be more reasonable for WorkCover WA to continue the registration of independent agents on a discretionary basis, subject to periodic re-application. This would place the onus on the agent to ensure they reapply, thereby reducing the administrative burden on WorkCover WA. It would also ensure that underperforming or non-complying independent agents could be easily removed from the register if necessary.

8. PART 7 – COMMON LAW

HIA opposes common law claims. Where they exist they should be restricted to those seriously injured, leading to severe disability or death and balanced against the total benefits provided to injured workers under the scheme.

The ability to claim twice for the same expenses has been addressed throughout the Draft Bill. This means that compensation for claims under the workers compensation scheme, statutory settlement, a common law claim and CISS cannot overlap. For example, in order to make a common law claim, a worker must make a formal election this will reduce their entitlements to workers compensation payments.

The pathway to a common law claim is not abundantly clear under the Draft Bill. For example:

- For common law settlement of workers compensation claims, the worker must experience a minimum of 15% whole person impairment and formally elect to pursue this pathway. (s.421(1)).
- For mesothelioma, the threshold to pursue a common law claim is increased to 25%. (s.425(7)).
- Damages must not be awarded against a worker's employer in respect of noise-induced hearing loss (s.419).
- If receiving CISS, common law rights are retained, but damages cannot be awarded for lifetime care costs. (s.609(5)).
- If entering into a settlement agreement, the common law pathway may not be available. (s.152).

Provisions are located in various parts of the Draft Bill and will ultimately be spread across various Acts. While the appropriate place for this information may not be in the Draft Bill, guidance to industry would be useful. Presenting this information in table or flowchart form allow workers and employers to get a clear picture of the available options.

9. PART 10 – MANAGEMENT AND DISCLOSURE OF INFORMATION

9.1. SECTION 505 - DISCLOSURE OF CLAIM INFORMATION FOR PRE-EMPLOYMENT SCREENING

The Draft Bill expressly prohibits a prospective employer from requesting a worker's history of compensation claims. This is intended to prevent discrimination against prospective workers on the basis of their claims history. This is a change from the current Act.

Working in the construction industry is often physically demanding. To carry out the work, workers are required to have a certain level of physical capacity. This is also necessary to ensure their safety and the safety of other workers on the site. A worker's claim history can provide the builder or contractor company with insight into pre-existing conditions and previous injuries that may impact on the worker's ability to carry out the requirements of the job or the builder's ability to provide a safe working environment. In some circumstances, if a builder is aware of this information, they may be able to alter the requirements of the job to better suit the worker.

HIA does not support the inclusion of this provision in its current form. We request that an exemption is provided where the nature of the injury or claim is related to the inherent requirements of the job or the worker's ongoing safety in the workplace. This will allow the employer to ensure that safety is maintained for both the worker and those around them.

The Draft Bill also maintains the requirement for confidentiality under the current Act and prohibits a person from disclosing a worker's compensation claim history to another person. An example of this is pre-employment screening.

HIA does not oppose this provision and notes that the employee should be given the choice whether to disclose or decline to disclose information regarding their claim history.

10.PART 14 – SAVINGS AND TRANSITIONAL PROVISIONS

10.1. SECTION 545 - ACT OPERATES AS CONTINUATION OF FORMER ACT

Section 545 provides that any matters pending, or claims commenced under the current Act continue under the Draft Bill. Generally, it appears that consideration has been given to a range of different matters than may be impacted by the transitioning to the provisions of the Draft Bill.

HIA reiterates its request for phasing in of provisions, or alternatively a transition period of at least 24 months is provided to allow for users of the scheme to prepare for the incoming changes.