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Manager Policy and Legislative Services  
WorkCover WA  
2 Bedbrook Place  
SHENTON PARK WA 6008  
[consultation@workcover.wa.gov.au](mailto:consultation@workcover.wa.gov.au)

### **WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2021 (CONSULTATION DRAFT)**

This submission is made by the Master Builders' Association of Western Australia (Master Builders).

Master Builders is one of the oldest registered employer associations in the Registry of the Western Australian Industrial Relations Commission with its registration remaining current since 1904.

Master Builders was formed in 1898 to represent the best interests of its respective builder members and those who participate in the building and construction industry in Western Australia. That core element remains at the heart of Master Builders registered rules today.

Master Builders has over 1,600 members comprising:

- National commercial builders
- Large state based commercial builders
- Specialist commercial sub-contractors
- Residential builders
- Residential sub-contractors
- Kindred employer groups
- Government agencies
- Suppliers

Master Builders membership carries out building and construction work throughout Western Australia in commercial construction, residential construction, resource construction and civil construction. Its members are located throughout Western Australia.

Master Builders maintains a continuous presence throughout the state via its regional office network in Bunbury, Albany, Geraldton to provide services to its regional members and to represent their interests.

Master Builders is also a member of the national Master Builders movement which comprises autonomous Master Builder Associations in each State and Territory which comprise Master Builders Australia. Collectively, the Master Builders movement represent over 32,000 businesses nationwide.

### **THE WORKCOVER REPORT**

In September 2013 WorkCover WA released the *Review of the Workers' Compensation and Injury Management Act 1981: Discussion Paper*.

The Discussion Paper was developed around the WorkCover internal review of the legislation which took into consideration issues which stakeholders had raised over many years. *The Review of the Workers' Compensation and Injury Management Act 1981: Final Report* (the Report) was released in June 2014.

The Report recommends a new Act be drafted and identifies 171 specific proposals for inclusion in the new statute.

The Report stated:

**17.** WorkCover WA has undertaken a consultative approach in the legislative Report process and finalisation of recommendations which has involved:

- Meetings and workshops with stakeholders.
- Detailed consideration of all 66 written submissions.
- Approval by the WorkCover WA Board.

**18.** There is strong stakeholder support for a rewrite of the Act and submissions received focus on particular proposals or issues requiring attention. As a result of the consultation process there are a number of proposals from the Discussion Paper that are not recommended in the Final Report, some that vary from what was proposed, and a small number of new recommendations. These are clearly identified in the Final Report.

## **BENEFITS**

Master Builders acknowledges that many proposed changes in the draft Bill were recommended by the Report. We welcome many improvements arising from the Report. Two are commended.

### **Definition of worker**

The definition of 'worker' will be changed to follow the test applied by ATO for superannuation and PAYG withholding purposes. This change is practical, owing to the complexity of the 'common law test' of who is, or is not, an employee under a contract of service. The building and construction industry is dependent on secure subcontracting arrangements and the ATO test is already very useful in resolving doubts on the division of employees and sole traders.

### **Case Conferences**

An aspect of the Bill is to improve return to work and injury management. As recommended in the Report, workers will be required to attend Case Conferences if arranged by the employer, insurer or treating medical practitioner. A Case Conference is intended to monitor and instruct the employee before and during a return-to-work program. Our members are often frustrated at the lack of access to information on the duration of the workers compensation absence.

This change will assist all parties and clarify the obligations of workers and employers.

### **A MATTER OF COST**

Master Builders submits that the draft Bill includes matters that were not recommended, absent from, or not on point with the Report. Whilst the supporting information to the draft Bill partially acknowledge this fact, the information does not adequately explain or account for the increased costs that will follow the new provisions.

We believe the government should address the following concerns about the costs of the changes prior to preparing the final draft of the Bill.

### **Doubling of Income Compensation**

The Government proposes to extend the period of compensation at the average earnings from 13 weeks to 26 weeks. This is contrary to the Report. The Report addressed compensation and recommended as follows.

#### **Weekly earnings**

**276** The intention is to provide clarity and certainty around the calculation of earnings for all workers. The majority of stakeholders accept and support the pre-injury earnings calculation as an appropriate method to achieve this.

**277** It is therefore recommended the new statute treat all workers on the same basis, with earnings calculated by reference to pre-injury earnings over a 12 month period.

**277** After 13 weeks of incapacity, payments will be reduced to 85% of pre-injury earnings. However, award workers will receive the greater of:

- a. 85% of preinjury earnings; or
- b. the base award rate of pay under the relevant award, exclusive of over award payments such as service payments, allowances and overtime.

Despite the clear difference between the draft Bill and the Report recommendation, the information supporting the draft Bill do not address the rationale of such a significant change, other than it was a political promise.

In the absence of an objective assessment, such as a 'needs' basis, the only conclusion is that the additional period of 13 weeks is without justification.

#### **Costs of doubling compensation period**

The supporting Guide to the draft Bill includes 'Indicative Cost Impacts.' It states:

*The change to the stepdown period has the potential to impact approximately 4,000 workers annually representing about 15.8% of claims. Preliminary costings estimate a 1.63% increase in the average premium rate would result from this change.*

We note that the supporting documents include a statement:

*'As part of the consultation process WorkCover WA is engaging the scheme actuary to provide a final cost assessment for the Bill'.*

It's disappointing that this final cost assessment was not completed and published in the information and other resources. Master Builders assumes that a Regulatory Impact Statement will be more informative once the Bill moves to a formal stage prior to introduction to Parliament.

Master Builders seeks assurance from the Government that the actuarial assessment will consider the special characteristics of employment in the building and construction industry.

## **BUILDING AND CONSTRUCTION INDUSTRY AVERAGE EARNINGS**

Whilst the government has stated there will be an increase in premiums, it has not disclosed which industries will experience higher than the average increase. The increases may differ greatly, from one industry or occupation to another.

Master Builders believes the 'average' increase of 1.63% cited in the background paper is imprecise and understated for specific sectors of the workforce. Clearly there are some sectors, including the building and construction sector, that will experience more than 'average' increase in premiums.

Four factors determine a construction worker's average earnings for the purposes of predicting workers compensation payments.

- The average ordinary time wages of a construction worker.
- The penalty rates for overtime.
- The total number of overtime hours worked each week.
- The length and frequency of Workcover absences.

### **1. The average ordinary time wages of a construction worker**

Employees in the Western Australian construction industry are recognized as in the top two of all industry earnings. The Australian Bureau of Statistics (ABS) latest release of key statistics reported that Western Australia and the Northern Territory, Mining and Construction were the industries with the largest share of wages and salaries. <sup>1</sup>

Its indisputable that the proposed change to income compensation will have a significantly greater impact on members of Master Builders than all other industries, bar mining.

#### **How can this be quantified?**

Ordinary time earnings are the base rate prior to loadings for overtime or shift work. The latest ABS series identify the average *ordinary* time earnings for Australia, full time employees, construction sector, as \$1695 per week. <sup>2</sup>

Although there is no ABS series on the same category for Western Australia, it is possible to estimate the average *ordinary* time earnings for full time employees in the Western Australian building and construction sector. This is attained by comparing the ABS reported rates of average all earnings for construction workers in Australia <sup>3</sup> and average all earnings for construction workers in Western Australia. <sup>4</sup>

The difference between the two figures is a factor of 1.27 in favour of Western Australia. This ratio then applied to the Australian average ordinary time earnings, which results in \$2152 per week, or \$56.63 per hour.

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<sup>1</sup> <https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/latest-release#key-statistics>

<sup>2</sup> ABS Series A84977168A

<sup>3</sup> <https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/average-weekly-earnings-australia/latest-release>

<sup>4</sup> ABS table 81550DO001\_201920 Australian Industry, 2019-20 tab 6

## 2. Award Overtime rates

Overtime penalty rates in the *Building and Construction General On Site Award 2020* are 150% for first 2 hours, and 200% thereafter. Saturday work is also calculated in the same way. Most modern awards require 200% after 3 hours. Each day's overtime stands alone when applying the first two hours.

## 3. Total number of overtime hours worked

It is normal for workers in the building and construction industry to work many hours of overtime. It is standard practice for most workers to work at least a 50-hour week, which is 12 hours overtime. Overtime is worked daily, and most workers will also work on Saturday morning.<sup>5</sup>

Prior to 2016 it was a common for industry enterprise agreements to include provisions stating that 50 to 56 hours was a nominal working week. See for example CFMEU WA Collective Agreement, AG846628, *clause 38*, and AG2014/7766, *clause 38.3*.<sup>6</sup>

After 2016 any references to maximum hours were removed from many enterprise agreements to comply with the *Code for the Tendering and Performance of Building Work 2016* (the Code). Employers tendering for federally funded construction projects are required to comply with Code. To be Code compliant, a business must ensure its enterprise agreement does not contain restrictions on working additional hours.

The industry continues to work long hours, despite the change in enterprise agreements.

ABS series confirms the building and construction sector works amongst the highest number of hours per week and employs a significant number of workers. Overtime is calculated daily and applies to any hours worked in excess of 7.6 per day (8 hours per day in a Rostered Day Off method).<sup>7</sup>

## 4. Length and frequency of absence from Injury

The information papers to the draft Bill do not provide any information of the length and frequency of periods of compensation. This is unfortunate, as it would assist submissions. In the absence of details, Master Builders must rely on summarized statistics contained in Workcover reports.

Consequently, we are aware that frequency rate of injury in the building and construction industry is above the average and the cost of each claim is above the average of all other industries. The Workcover Report has acknowledged this in a simple depiction at Annexure A.

### Calculating 26 weeks average earnings

As identified above, the average weekly ordinary earnings in the industry are \$2,152.

For this example, it is rounded down to \$2000 for 38 hours. 12 hours overtime is added to this amount. 8 hours are calculated at 150% (\$679); plus 4 hours at 200%. (\$453). This results in the 'average earnings' of \$3132 per week.

A 'step down' to 85% reduces the sum by \$470, to \$2662.

<sup>5</sup> [ABS table 6291.0.55.001 EQ10 - Employed persons by Hours usually worked in all jobs and Industry division of main job \(ANZSIC\), May 2001 onwards](#)

<sup>6</sup> Fair Work Commission Enterprise Agreements

<sup>7</sup> ABS Table 6291.0.55.001 EQ 10

Theoretically, if a worker is absent on workers compensation for at least 26 weeks, the payment is \$6110 more than the current requirement.

Insurers will take steps to recover the increased payouts.

### **Commercial contracts locked in.**

The government must consider that most construction contracts are fixed in advance, and that labour is a significant cost. The 'charge out' rate of a worker always includes the costs of workers compensation.

The ABS assess total labour costs to include: <sup>8</sup>

- Wages and salaries
- Employer contributions to superannuation
- Workers Compensation premiums and costs
- Selected labour costs
- Fringe Benefits
- Payroll Tax

However, with compounding costs of:

- Increased premiums due to higher compensation payments,
- Provisional payments on the delay in assessments, and
- The transfer of all costs of rehabilitation onto the employer,

The draft Bill is by incremental steps placing the employer in an uncertain and unpredictable position with future costs. These are significant direct and indirect costs that will diminish the performance of businesses, already struggling to navigate and recover from a once in one-hundred-year pandemic.

### **Relief from compensation costs**

The government is urged to reconsider its proposal to extend the step-down date by 13 weeks. Master Builders believes it is more suitable, at least in the interim, to mitigate the cost burden on business, and extend the period before a step down to 85% by 4 weeks, to a total of 17 weeks at average earnings.

### **Insurance Premium Rates**

It is extremely unlikely that insurers will absorb increased compensation costs arising from the new payment calculations. An insurer is also a business, and it will adjust premiums to stay profitable. Insurers will seek to offset the higher payments and will not be constrained by current 75% cap on discretionary loadings.

In 2013 the insurers lobby advocated the removal of the 75% threshold, but it was rejected outright by WorkCover. The insurers claimed the market would self-regulate, and there would not be a surge in premiums.

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<sup>8</sup> <https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/latest-release#key-statistics>

This submission was categorically denied by WorkCover. Its response at paragraph 660 of the Report is unambiguous. There is no evidence that this position has changed, nor that the concern of increased premium charges has lessened.

- 660.** WorkCover WA does not support the removal of this obligation which supports the integrity of the premium rating process and protects against unreasonable premium loadings on employers.

The government has not acknowledged this vehement opposition from the administrator of the scheme. Master Builders is very concerned that there is no evidence in the supporting papers to the draft Bill which could lessen its concerns of increased costs.

For example:

- Has the government examined the nature of the applications made to exceed the 75%?
- How many applications to increase the loadings have been made and rejected?
- Has the government identified a trend post 2014 that dispels the concerns expressed by WorkCover?

In the absence of such information, there is great uncertainty on the trajectory of the average premiums. It will be going up, but how steep is yet to be discovered.

That is why (as is the case in the doubling the average income period to 26 weeks) the government should defer the introduction of the Bill to Parliament until a comprehensive costing is completed and the public can consider the results.

### **Workplace rehabilitation**

The Bill seeks to streamline the process of return to work and injury management. It is therefore surprising that the Government is taking the step of declaring rehabilitation as not part of the compensation phase. The resource material to the draft Bill does not explore the matter of costs, nor is there any details on how it will impact the provision of necessary rehabilitation. The Report never considered shifting costs to employers, nor did it venture to redefine rehabilitation as not part of compensation.

By designating all rehabilitation services as not compensation, the draft Bill does not differentiate between the management of the return-to-work services and the workers receiving the actual services.

- The Workers Compensation and Injury Management Regulations 1982, REG 44, includes.
- Support counselling activities to assist the worker to adjust to the injury and to the worker's return to work.
- Progress counselling related to the progress of, and problems with, the worker's return to work.

The WorkCover website describes workplace rehabilitation providers as follows.

An approved workplace rehabilitation provider (WRP) can assist the employer and injured worker if there are problems with the return-to-work process. WRPs are commonly health professionals such as occupational therapists, physiotherapists or psychologists who have expertise in addressing the physical, psychological and/or workplace barriers that may prevent an injured worker returning to work.

WRPs are approved by WorkCover WA and have the appropriate qualifications, experience and expertise to provide relevant services based on the assessed need of the worker and the workplace.<sup>9</sup>

These activities are personalized, professional treatments while the worker is under WorkCover. Master Builders believes the draft Bill should be amended to recognize costs for such treatment and therapies are compensation costs.

### **Other matters**

#### **Prescribed (Presumptive) Diseases**

The guidance material to the draft Bill states that Schedule 3 of the current Act will be repealed with 'all required presumptive diseases from Schedule 3 included in Regulations made under the new Act.' This much is clear, though it is not apparent in the guidance material which diseases specified in Schedule 3 will be included as a prescribed disease under new Regulations, nor what diseases may be also deemed presumptive.

It seems from the guidance material that the government is seeking to extend the prescribed 'presumptive diseases' beyond the rationale it put forward in 2020, concerning COVID.

Master Builders wrote to the Hon Colin Tincknell MLC on 7 August 2020 addressing our concerns at the prospect of an employer facing reverse onus on a disease that is predominantly transmitted through activities occurring outside a work environment. We also expressed reservations that the list could swell, and other community transmitted diseases will be included in the regulations.

Our position has not changed. We recognise that it is sometimes necessary to designate certain diseases as presumptive diseases, but the ability to do so must not to be misdirected.

Master Builders requests that the Government consult with employers prior to making the new Regulations.

Thank you for the opportunity to raise these concerns.

Yours sincerely



**John Gelavis**

**EXECUTIVE DIRECTOR**

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<sup>9</sup> <https://www.workcover.wa.gov.au/health-providers/workplace-rehabilitation-providers/>



## ANNEXURE A

### INDUSTRY STATISTICAL REPORT 2016/17 - 2019/20

### CONSTRUCTION IN THE WESTERN AUSTRALIAN WORKERS' COMPENSATION SCHEME SEPTEMBER 2021

#### Construction at a glance 2019/20

