Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Submissions

Bill Clause	Comments
Part 1, Division 2, clause 5	**Definition of Return to Work** Concerns are raised with the proposed change to the definition of "return to work", specifically subparagraph (b) which provides that a return to work means "the worker's return to work in suitable employment". This phrase is defined at Clause 165 of the Bill and submissions in respect of that Clause are outlined below. The use of the phrase "suitable employment" is far too broad, subjective and would erode the legal principles that have been established to protect the cessation of weekly payments pursuant to s 61 of the current Act. Specifically, the proposed change in definition would be at odds with the decision of *Department of Education v Kenworthy* (1990) 3 WAR 1 which prevents an employer from discontinuing or reducing weekly payments other than as authorised by the Act.
Part 1, Division 2, clause 5 and clauses 12 to 14	**Exclusion of Extended Definition Workers** Significant concern is raised as to the altered definitions of "*worker*" and "*employer*" to recipients and payers of PAYG withholding tax respectively (definitions in s. 5 of the Bill read with s. 12). The Bill makes no allowance for 'extended definition workers' as defined in the current Act and will in real terms exclude a class of vulnerable persons from the workers' compensation scheme. It is the position of the Australian Lawyers' Alliance that the altered definitions will create a significant and unjustified disadvantage to injured persons in Western Australia. It is necessary to contrast with the definitions of "*worker*" and "*employer*" in the current Act which are set out below: *"**employer** includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer, and, where the services of a worker are temporarily lent or let on hire to another person by the person with whom the worker has entered into a contract of employment the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the worker whilst he is working for that other person;* *the term **employer** shall extend to any person for or by whom any worker, as defined in paragraph (a) or (b) of the definition of **worker** , works or is engaged…"* "***worker** does not include a person whose employment is of a casual nature and is not for the purpose of the employer's trade or business, or except as hereinafter provided in this definition a police officer or Aboriginal police liaison officer appointed under the Police Act 1892 ; but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer,*

	whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing; *the term **worker**, save as hereinbefore provided in this definition, includes a police officer or Aboriginal police liaison officer appointed under the Police Act 1892 , who suffers an injury and dies as a result of that injury;* *the term worker save as aforesaid, also includes —* *(a) any person to whose service any industrial award or industrial agreement applies; and* *(b) any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services."* The definitions in the current Act focus the enquiry on the substance of the relationship between the purported worker and employer and allow a determination to be made that takes into account all of the circumstances. The proposed Bill does not. The Australian Lawyers' Alliance is unaware of any evidence which would establish that the changed definitions of "*worker*" and "*employer*" are necessary and given the real disadvantage the proposed definitions would create for Western Australian workers in practical terms, suggests that the definitions in the current Act should be maintained.
Part 1, Division 3, clause 7 (Exclusion of Injury)	**Exclusion of Injury – Reasonable Administrative Action** Proposed section 7 in the Bill largely reflects the exclusory provisions found in s. 5(4) of the current Act, however, the additions in s. 7(1)b) and s. 7(1)(d) to make informal counselling and informal disciplinary action part of the suite of excluded circumstances will significantly increase the percentage of stress claims made excluded and not compensable. The term '*informal counselling*' is far too broad and will encapsulate most circumstances which cause a worker to become mentally unwell. The Australian Lawyers' Alliance is unaware of any evidence which would establish that the significant expansion of the exclusory provisions for stress claims are necessary and given the real disadvantage the proposed definitions would create for Western Australian workers in practical terms, suggests that proposed subsection 7(1)(b) be removed from the Bill and the words "*whether formal or informal*" be removed from proposed subsection 7(1)(d) of the Bill. The Australian Lawyers Alliance reiterates its view that the proposal to include *"informal counselling*" and "*informal discipline*" as exclusory provisions to stress claims in the workers' compensation scheme will create generational disadvantage to Western Australian workers and their families.
Part 2, Division 2, clause 34	**Authority for Collection of Information** Significant concerns are raised with respect to the proposed automatic authorisation as outlined in the new proposed Clause 34 for the disclosure of relevant information.

	A person's right to privacy is paramount and is enshrined in the *Privacy Act 1988* (Cth). The reality and practical implication of the new proposed clause is that an authorised discloser of relevant information does not and will not have the time or resources to redact or omit information that meets the definition of "relevant information" and that they will simply release a complete copy of the injured workers' medical/hospital records. Just because a person is injured at work and makes a workers' compensation claim should not mean they are forced to waive their rights to privacy and that their medical/hospital records are automatically disclosed to a workers' compensation insurer or their employer. There may be information contained in their medical file that is very private and not relevant to their workers' compensation claim and the release of same could be prejudicial and embarrassing to the worker. For example, a worker might break his/her ankle at work and their medical notes may contain records of marital issues or unrelated health complaints or concerns such as STI tests or other embarrassing medical conditions etc. This is the basis as to why there are authorities contained in the Claim Form 2B and in the First Certificate of Capacity. A workers' right to provide consent for the release of their private medical information should not be interfered with and would impinge on their legal rights. There is well established case law (*Leonard Cohen & Co v Sigi Hallis Cohen* CM-43/03) in support of the above and the existence already of the ability to obtain such relevant information pursuant to Rule 50 of the *Workers' Compensation and Injury Management Arbitration Rules 2011*. Accordingly, we submit that Clause 34 is not required and should be removed.
Part 2, Division 2, Clause 35	**Incapacity after claim made** We consider that this provision should expressly state what steps are necessary to instigate such a claim as opposed to deferring to the regulations. The current Act allows a claim for weekly compensation payments to be made in circumstances where the First Medical Certificate did not specify that the worker had any incapacity for work (though the Act is silent on this point), and we believe this process should be straight forward, quick and efficient.
Part 2, Division 3, Clause 49	**Incapacity for work** Clause 49(3) is vague, imprecise and is of concern given the provision appears to suggest that the calculation of a partial incapacity benefit will exclude the average of all pre-injury payments for overtime, bonuses and allowances. Such an interpretation would result in the payment pursuant to Clause 49(2) being reduced by the amount the worker earns, or is likely to earn, in suitable employment, but would also exclude overtime, bonuses and allowances from the calculation.

	We cannot see any basis for such a provision, and it will result in an unfair reduction to the weekly payments of those workers who are partially incapacitated only. As Clause 49(2), in conjunction with Subdivision 3 provides for the payment of a partial incapacity benefit, we cannot see the utility of this clause. We note that Clause 56 does not apply to a payment as for partial incapacity and it appears that the intention of Clause 49(3) is to unfairly reduce the amount of compensation that is a received by way of a partial incapacity benefit. We respectfully submit that Clause 49(3) should be removed.
Part 2, Division 3, Clauses 55, 56	**Calculation of Income compensation** While we commend the Government for the implementation of Clause 55 which ensures that the calculation of weekly compensation benefits will include the average of all earnings received in the 52 week period prior to the injury (or part thereof), we raise a serious and significant concern in respect of Clause 56. Clause 56(2) and (3) expressly provide for a reduction in weekly payments for all injured workers after receiving 26 weeks of compensation benefits, with no distinction being made between award workers and non-award workers. We note that the explanation to the Bill asserts that this provision is beneficial to injured workers (namely an increase in the amount of time in which an injured worker receives weekly compensation payments at the full rate from 13 weeks to 26 weeks), however this overlooks a long line of District Court and Supreme Court authority which have held there is to be no reduction from the 14th week and onwards for "award workers" and that the injured worker "*should be placed in as near as possible the position that he or she would have been in had not the incapacity occurred".* We refer to the Full Court authority of *Swan District Hospital v Cue* (unreported, delivered 7 August 1996, Library No. 960424), *Nelson v Royal Perth Hospital* (unreported, delivered 6 August 1998, Library No. 980434) and *EG Green & Sons Pty Ltd -v- Sabourne* [2009] WASCA 172. The authorities above have since been applied by the District Court in *Fremantle Hospital -v- Owens (C11 – 2019), Currie -v- Western Power Corporation* (C11 – 2011) and *McMillan -v- Burrup Fertilisers* (C12-2011) These cases make it plainly clear that an injured worker is to receive the average of all pre-injury earnings, save for those which are unusual or one-off in nature. That applies under the current Act for the first 13 weeks of incapacity (Amount A) and from the 14th week and onwards (Amount Aa). We strongly object to the inclusion of proposed Clause 56 and submit that it should be removed in its entirety. Clause 55 adequately addresses all matters in respect of the calculation of weekly payments and it should be left to stand as is.

Part 2, Division 3, Clause 57	**Maximum weekly rate of compensation** We note that the bill retains the present Amount C cap, described as the "maximum weekly rate of income compensation". When considering the success of the state's economy and the fact that many workers, particularly those working FIFO, are earning more than the current Amount C ($2,772.00 gross per week), we submit that this provision should be removed, or the maximum weekly rate increased significantly. It is difficult to understand the rationale for retaining this provision and causing those high income earners to be disadvantaged when injured. Increasing or removing a cap on the amount to be paid in weekly compensation benefits is also consistent with the authority referred to above which provides that an injured worker "*should be placed in as near as possible the position that he or she would have been in had not the incapacity occurred".* We doubt that such a change would have any major impact on the overall cost of the scheme and consider that any increase to premiums would be minimal.
Part 2, Division 3, Clause 63	**Reducing or Discontinuing Income Compensation** With reference to the circumstances in which an employer may reduce or discontinue payments, we submit that Clause 63(d) should be amended or clarified to ensure that written consent is taken as being "informed consent" in the legal sense. There are many circumstances in which an injured worker provides written consent to the cessation of weekly payments at the request of the employer (usually with the employer preparing the document for the worker to sign), yet the worker is either pressured to do so or not afforded the opportunity to obtain legal advice in respect of the proposed cessation of payments. Expressly stating that the consent of the worker is "informed consent" would rectify this issue.
Part 2, Division 3, Clause 64	**Reducing or Discontinuing Income Compensation** Whilst we agree with the premise of this proposed clause, we consider it appropriate to include a provision in similar terms to Clause 65(2), thus allowing a worker to dispute the employer's intention to reduce or discontinue payments in accordance with the notice given. Although the worker may have returned to work, either with the pre-accident employer or an alternative employer, there may be a dispute as to the extent of the proposed reduction in weekly payments. As the provision is presently framed it would allow an employer to dictate the terms of reduction or discontinuance and there is inadequate protection given to an injured worker should they dispute the position of the employer.

Part 2, Division 3, Clause 65	**Reducing or Discontinuing Income Compensation** With respect to proposed Clause 65, we query why the terms of s 61 of the Act have been altered and raise our concern as to the way this provision may be interpreted and/or applied. Importantly, s 61 currently provides that an employer must serve on the worker a notice (Form 5 notice) which includes a report of a medical practitioner who "has certified that the worker has total or partial capacity for work or that the incapacity is no longer a result of the injury". By the authority of *Vurlow v Leighton Nursing Home* [1978] WAR 15, it has long been held in the jurisdiction that unless the notice served by the employer complies with the Act, it may be struck out and the application dismissed. The proposed wording of Clause 65 is far too broad and is likely to erode establish legal principles. In particular, the phrase "the ***extent*** to which the worker's incapacity for work is a result of the worker's injury" is vague and would allow an employer to serve a notice in a wide range of circumstances. We submit that the terms of s 61 in the current Act should be retained, and Clause 65 amended to reflect this. We would suggest that Clause 65 expressly recognise the fact that unless the certificate or report accompanying the notice properly certifies to a relevant matter, the notice will be held invalid.
Part 2, Division 3, Clause 65	**Reducing or Discontinuing Income Compensation** Further to the submission above, we raise concern with proposed Clauses 65(4) and (5) as each clause is far too broad and provides an Arbitrator with a wide discretion to determine the application as they see fit. Consistent with the manner in which applications pursuant to s 61 of the Act are currently determined, the legislation should expressly state that the Arbitrator is to determine whether or not the worker has total or partial capacity for work, or whether the incapacity is no longer a result of the injury. We submit that this should be the extent of the power conferred on the Arbitrator and consider that Clause 65(4) should be amended to this effect, whilst Clause 65(5) should be removed in its entirety. Indeed, Clause 65(5) goes to matters well beyond the scope of a s 61 dispute given it allows an Arbitrator to take into account additional matters, such as whether the worker has participated in an established return to work programme (which is highly subjective and could be applied unfairly).
Part 2, Division 8	**Dust Disease** Concern is raised with the length of time it is presently taking for a claim to be accepted following lodgement, and the delay associated with the requirement to attend upon the WorkCover WA Industrial Diseases Medical Panel (IDMP). This delay is causing significant anxiety and stress to those workers suffering from an industrial disease, and we submit that the following amendments should be made to the claim acceptance process:

	1. The requirement that workers must attend before the IDMP before their claims can be accepted ought to be removed. Other states, such as Queensland and Victoria, allow claims officers for the insurers to make determinations based on the medical evidence available from treatment providers and diagnoses of treating doctors. In some cases, further investigation of the diagnosis or relative contribution of employment is necessary and it is only in such circumstances that further medical assessment should be undertaken prior to claims acceptance. 2. The ordinary requirement that a workers' compensation insurer must make a determination within 14 days of receipt of the application should apply. If the worker's compensation insurer is unable to make a determination within that timeframe, a pended or disputed notice should be issued and insurer should be given 5 business days to refer the claim to an independent specialist for further assessment. This assessment must be conducted within 1 month of the pended or disputed notice being issued. 3. If the insurer is still unable to make a determination following receipt of the specialist report, the worker is given the option to refer the claim to conciliation or seek a referral to the IDMP. If the worker chooses the latter, the IDMP must be convened within 1 month of receipt of the referral. 4. If the insurer is unable to make a determination within 5 business days of receipt of the IDMP determination, the matter is to be considered disputed and is referred to Arbitration. It will be evident at that time that the parties continue to have a dispute and therefore commencing the process from conciliation appears futile. The matter can proceed to determination by an Arbitrator. Further, it is noted that s 41 of the Act has not been retained and we raise concern as to why that is the case. Section 41, the "last employer" provision, is critical in ensuring an injured worker can prosecute their claim when the exposure to mineral dust or asbestos occurs with multiple employers. This provision allowing compensation to be recovered from the last employer is critical and we submit that an equivalent provision should be retained.
Part 2, Division 11	**Settlement of Claims** We raise serious concern with the new provisions contained in the Bill at Division 11, particularly Clauses 148 and 152 which prevent the settlement of a denied claim or an agreement involving common law damages It is suggested that the common law settlement pathway (s 92(f) in current Act) cannot be used to settle workers compensation claims, unless the 15% whole person impairment requirement is met and an election to pursue common law is registered. We do not support this proposed change. We refer you to the Conciliation and Arbitration services status report June 2021. Page 20 states that for the period of December 2020 – June 2021 the proportion of arbitrations by duration from the last formal Arbitration hearing to completion is more than 16 weeks and has increased by 47%. The number of closed conciliation conferences from December 2021 – June 2021 is 2002.

	The number of conciliations with subsequent arbitration applications from December 2020 – June 2021 is 652 applications. From December 2020 – June 2021 206 matters attended a Pre-Arbitration hearing. The above statistics show an increase in claims for a period of six months and a significant delay in obtaining decisions from an arbitration. Given the current delays in obtaining decisions from an Arbitration we are of the view that if matters are not able to be settled by way of 92(f) deed (or equivalent settlement pathway) for disputed claims the delay will be extended, and the costs associated with the process will also be significantly increased. This will go against section 3(d) of the current Act as the proposed pathways in relation to settlements is not 'fair, just, economical, informal and quick'. We recommend amendment to allow the settlement of all workers' compensation claims, irrespective of whether liability has been accepted or determined. We submit that a streamlined process is necessary, whereby the completion and filing of an approved document is sufficient to finalise all claims, including claims for common law damages.
Part 3, Division 2, Clauses 162 and 163	**Return to Work** We raise concern with this new provision and consider it will be unfairly applied to the detriment of injured workers. Presently, s 156B of the Act provides an Arbitrator with the power to order a worker to participate in a return to work programme, however there is no power to suspend weekly payments. Under the current Act an employer / insurer may seek a review of weekly payments on the basis that the worker has the ability to earn in suitable employment or that they have failed to mitigate their loss (ie. s 60, s 61, s 62). We consider that a review of payments under equivalent provisions is the appropriate way in which to deal with disputes of this nature. Clauses 162 and 163, when read together, are far too broad and could result in weekly payments being unfairly suspended in circumstances where the subjective belief of the employer is that the worker has failed to comply with ***any*** of the duties referred to at Clauses 162(1) to (5). For example, it is proposed that there be a "duty" to provide progress medical certificates issued to the worker within 7 days of receipt. On a strict interpretation, weekly payments could be suspended for failing to comply with this provision. We submit that this Clause should be removed in its entirety.
Part 3, Division 2, Clause 164	**Return to Work Conference** Further to the submission above, we have serious concerns with Clause 164 of the Bill and submit that it should be removed. Whilst the intention of this provision is unknown, noting there is no equivalent within the current Act, we strongly object to a provision which allows an employer to force an injured worker to attend a "return to work case conference".

	Such an obligation would erode the present entitlement of a worker to engage a vocational rehabilitation provider of their own choosing and is inconsistent with the new provision preventing an employer or insurer from attending an appointment with the treating GP. We cannot accept the rationale that a "return to work case conference" arranged by an employer would be for the purpose of "the worker's recovery and enhancing opportunities for the worker's return to work". To the contrary, the provision would likely be used to the advantage of the employer / insurer to dictate the terms of the return to work programme.
Part 3, Division 2, Clause 165	**Definition of Suitable Employment** We have serious concerns with proposed Clause 165 given the definition of "suitable employment" is extremely broad and is likely to be relied upon by the employer / insurer to the worker's significant disadvantage. The definition of suitable employment will be considered by an Arbitrator when determining any dispute involving a claim for weekly payments, or when weekly payments are reviewed by the employer. As it presently stands, proposed Clause 165 defines "suitable employment" in very broad terms, and it appears that the intention of the provision is to include any form of work being carried out by an injured worker on a return to work programme. For example, Clause 165(1)(b) defines suitable employment as including: "*employment with any employer in a position created or modified particularly to be suitable for the worker having regard to all or any of the matters specified in paragraph (a)(i) to (vi)".* Further, Clause 165(3) states that: *"Suitable duties include duties undertaken in the position in which the worker was employed immediately before having an incapacity for work in respect of which the amount of time the worker performs the duties, or the range of duties the worker performs, is increased in stages according to a return to work program."* Finally, Clause 165(4), appears to qualify the above by providing: *"Suitable duties do not include duties that, having regard to the nature of the employer's trade or business, are of a merely token nature or do not involve useful work."* These provisions are poorly drafted, ambiguous and will almost certainly become the subject of legal argument as to their correct interpretation. It is likely that an employer would rely upon this provision to reduce or discontinue the payments of an injured worker in circumstances where that work continues to engage in a return to work programme on modified duties, with no actual return to work. Importantly, we repeat our submission above that the inclusion of a new definition of "suitable employment" is far too broad, subjective and would erode the legal principles that have been established to protect the cessation of weekly payments pursuant to s 61 of the current Act.

	Specifically, *Kenworthy* provides that a worker engaged in a return to work programme on modified duties will not have "returned to work" in the legal sense. Rather, the question is whether the worker has the capacity to obtain suitable employment available to them in the open labour market. We submit that Clause 165 is entirely unnecessary, unfair and should be removed from the bill.
Part 3, Division 4, Clause 172	**Provision of Workplace Rehabilitation Services** Whilst we have no difficulty with this provision generally, we consider a further sub-clause should be added to expressly state that an injured worker is entitled to appoint a vocational rehabilitation provider of their own choosing. Although that is an established position in the jurisdiction, the current Act does not contain such a provision and we believe it is appropriate to formally legislate that right.
Part 4, Division 3, Clause 188	**Secondary Conditions – Assessing Whole Person Impairment** The Australian Lawyers Alliance strongly advocate for the removal of this clause to ensure that the assessment of whole person impairment includes secondary psychiatric conditions. It is often the case that an injured worker will suffer physical injury that does not exceed the 15% WPI threshold however that worker has developed a psychological condition causing significant impairment. This is an important issue in the jurisdiction, and we are not aware of any publication / statistics which demonstrate that scheme costs would dramatically increase should the change be made.
Part 6, Division 4, Clause 349	**Varying Interim Orders of a Conciliator** Proposed s. 349 of the Bill allows an Arbitrator to confirm, amend or revoke any directions of a conciliation officer including 12 week interim payment directions and interim suspension directions. While the Australian Lawyers' Alliance appreciates that an Arbitrator might be in a superior position to determine an injured worker's entitlements than a conciliator, the result of revoking an interim payment order in a worker's favour or a refusal to make an interim suspension order would be that the worker will have received money in the past which is likely to have been spent and will be in a position where there is a finding they were not legally entitled to this money and will be in debt to the employer. To avoid the uncertainty of future debts being owed by injured workers and associated hardship the Australian Lawyers' Alliance is of the view that interim payment orders should not be able to be revoked by an Arbitrator and proposed s. 349 should be amended accordingly.

Part 6, Division 5, Clause 365	**Provision of Information to a Health Professional** As presently worded proposed s. 365 of the Bill allows a conciliator or arbitrator to provide information to other parties to the dispute and to a health professional. The Australian Lawyers' Alliance accepts that once in receipt of information a conciliator or arbitrator should be able to provide this information to the parties to the dispute, however, the Australian Lawyers Alliance is of the view that guidance must be placed on the circumstances in which information is provided by a conciliator or arbitrator to a health professional.
Part 6, Division 5, Clause 366	**Representation by a Person who does not have binding authority** Proposed subsection 366(4) establishes that a conciliator or arbitrator may refuse to permit a party to be represented by a person if of the opinion that the person does not have sufficient authority to make binding decisions on behalf of the party. While this provision mirrors s. 182S(5) of the current Act the Australian Lawyers' Alliance queries the practical utility of this provision in circumstances where representatives will always require their client's authority to make decisions which legally bind them.
Part 6, Division 8, Clause 391	**Appeals to the District Court** The Australian Lawyers Alliance suggest that Clause 391 be amended to allow a party to bring an application to extend time in which to appeal. As it currently stands, the time frame in which to appeal is strict (28 days) and decisions of the District Court have held that an extension of time cannot be granted. That is compared with an appeal from a District Court Judge to the Supreme Court of Appeal in which an extension can be sought. We submit that is appropriate to amend this clause so that the position as between WorkCover and the District Court and the District Court and the Supreme Court is consistent. Such a change would be fair and just in the circumstances.
Part 7, Division 2, Clause 421 – Common Law	**Constraints on Common Law Damages** The Australian Lawyers Alliance consider that one of the key areas of the Act requiring legislative reform are the provisions restricting the right of an injured worker to commence common law proceedings against their employer. We note that Part 7 of the Bill contains no substantive amendments, and the apparent intention is to maintain the constraints on common law damages introduced in 2005. As solicitors and barristers having direct involvement with workers affected by these provisions, we have seen how the legislative restrictions have caused significant prejudice and hardship. It is evident that obtaining a whole person impairment (WPI) assessment of not less than 15%, let alone 25%, is difficult, and we have found that many workers with serious injuries do not meet the minimum threshold.

	We consider these restrictions to be unduly harsh and they have prevented many workers with serious injuries from being able to prosecute a common law claim against their employer. In such circumstances, the claim for compensation is limited by the prescribed amount, notwithstanding the worker may be permanently incapacitated for work. Whilst we commend the Government for removing the "termination day" by way of its 2020 amendments, many injured workers with a strong case in negligence against their employer are unable to bring that case given the restrictions currently imposed. We bring to the Government's attention the fact that an injured person may bring other forms of action, such as a motor vehicle accident claim, public liability or medical negligence claim without having to overcome any form of WPI threshold. We consider this an unacceptable situation and see no reason why a work injury claim against an employer should be subject to a WPI threshold when other personal injury claims are not. An employer owes its employees a strict, non-delegable duty and under the current statutory provisions, employers can escape liability for their negligence when a worker does not reach the 15% WPI threshold. We believe that the legislation should be structured in a way that ensures employers are kept accountable for their actions and workplaces are kept safe. The Act as presently drafted does not promote such an objective. Whilst we understand these constraints were put in plae to reduce the overall cost of the scheme, it is now injured workers who are paying the price. We believe the Western Australian Labor Government is presented with the opportunity to bring about a positive and long lasting change to the state's workers' compensation system by removing the constraints on common law damages. If such a change was made, it would allow workers to be properly compensated for their work injury in circumstances where the employer has negligently caused those injuries. It is difficult to accept the position that a person with a reasonable case in negligence is unable to proceed with that claim through the application of an artificial WPI threshold. Simply put, if a worker has a case in negligence against the employer and their damages claim is likely to exceed the entitlements payable under the legislation, they should be entitled to prosecute that claim. In these circumstances we implore the Government to rectify this injustice by either removing the WPI thresholds entirely, or by reducing the percentage required to commence a common law claim. At the very least, we submit that the WPI threshold should be reduced to either 5% or 10%, putting in place some form of threshold to prevent minor claims from progressing to the District Court. Otherwise, the restrictions on the award of damages contained in Part 2 of the *Civil Liability Act* 2002 (WA) should apply to ensure that certain thresholds are met in relation to the claim (and therefore no different to all other personal injury claims).

Part 7, Division 2, Clauses 422 and 423	**Effect of Election to Retain the Right to Seek Damages** Of further concern to the Australian Lawyers Alliance are the provisions contained within Clause 422 and 433 of the Bill. We note these are in substantially the same terms as s 93P and s 93K of the Act. As outlined above, we submit that the 15% WPI threshold should be removed or reduced given many injured workers with serious injuries are assessed as being below 15%. In any event, we advocate for the removal of Clause 422 so as to ensure that once the relevant WPI threshold has been reached, all common law claims are treated equally. Clauses 422(1) and (2) (currently contained at s 93P of the Act) are particularly prejudicial and are designed to deter an injured worker from commencing common law proceedings in the first place. That deterrence is in the form of a withdrawal of compensation benefits over a period of 6 months, and the immediate cessation of statutory expenses. Of even greater significance is Clause 423 (the current s 93K(5) – (7)) which provides for a maximum damages award for those workers assessed as being between 15% to 24%. That maximum is currently $502,279.00, however this includes the total of all compensation benefits received under the Act. Consequently, at the point a worker resolves their claim in the District Court the amount received in damages is significantly less, and usually in the range of $200,000.00 to $300,000.00. That is in circumstances where the total claim for damages would be two or three times this amount. We repeat our submission above that these artificial thresholds should be removed thus allowing a claim for damages to be assessed on its own merits, though having regard to the limitations put in place by Part 2 of the *Civil Liability Act*. It is difficult to accept a position whereby the actual claim for damages exceeds the maximum allowed, yet the statute arbitrarily limits the amount that can be sought. It is only work injury claims that are subject to this limit and the Australian Lawyers Alliance implore the Government to carefully consider this issue and implement important change. That can occur through the reduction (or removal) of the WPI threshold and by removal of Clauses 422 and 423.
Part 13 – Clause 537	**General Maximum Amount** With respect to Clause 537 and the sum determined as being the “general maximum amount”, we note there is no intention to apply an increase to the current prescribed amount of $239,179.00. For the following reasons the Australian Lawyers Alliance submit that Clause 537 should be amended to increase the “general maximum amount” to at least $300,000.00, indexed annually, or three years of the workers annual earnings, whichever is the greater.

	As stated above with respect to Clause 57, due to the success of the state's economy and the fact that many workers, particularly those working FIFO, are earning in excess of $130,000.00 to $150,000.00 annually, it is necessary to provide for a significant increase to the prescribed amount to ensure those high income earners are not prejudiced. A worker whose weekly payments are restricted to the maximum Amount C rate of $2,772.00 gross per week will receive weekly payments for approximately 86 weeks only. We consider this to be an unacceptable situation given those with serious (or even moderately severe) injuries are unlikely to have exhausted all treatment options by this time and may not have stabilised to the extent required to undergo a WPI assessment. We cannot see the basis for a scheme which unfairly impacts high income earners and consider the proposed change of allowing up to three years of annual earnings to be a fair and equitable result. The three year period also coincides with the limitation date for personal injury claims and by this point, workers with serious injuries are likely to have commenced common law proceedings. The current prescribed amount of $239,179.00 has caused significant prejudice to many injured workers and we implore the Government to rectify this issue.