Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Submission Template

Bill Clause	Comments
General	Provide general comments here. To ensure the Bill achieves its purpose of delivering a modern and clear Act the Government welcomes submissions on any aspect of the Bill and the following general matters: ▪ the structure of the Bill, sequencing of Parts and Divisions, and the placement of sections to ensure they are in a logical order ▪ whether the parts of the Bill and key provisions are easily read and understood, e.g, the fundamental provisions that provide who is covered, the compensation payable, the processes for claiming compensation and dealing with disputes ▪ the use of regulations (subsidiary legislation) to appropriately deal with certain matters where flexibility is required to respond to unforeseen issues ▪ the transitional and savings provisions to ensure all claims and proceedings arising under the current Act are addressed when the new Act comes into operation.

	Provide comments here on specific clause or clause(s) of interest to you. Add a row for each clause or related clauses of the Bill you wish to comment on. You do not have to address every clause or part of the Bill. Your submission can address as many, or as few, parts or clauses of the Bill as you want.
Part 13, Clause 5, 37 (General maximum and other adjustable amounts]	We submit that the maximum prescribed amount of wages (presently $239,179) set out in the present Act and with no proposed changes in the Bill, does not sufficiently cover injured workers who are earning attractive annual salaries due to their expertise and contractual arrangements. There are many workers on mine sites with FIFO contractual arrangements, workers in construction and long-haul truck drivers to name a few who are exposed to work injuries and are not sufficiently covered for their periods of incapacity. Based on the present maximum weekly wage of $2,772, an injured worker who earns an annual salary of $144,000 or greater will only have 86 weeks of incapacity payments available prior to those payments ceasing. An injured worker earning $100,000 will only have a maximum period of 124 weeks over the duration of the claim. It is submitted that the prescribed amount should be increased to at least an amount of $300,000 to be indexed annually in accordance with the calculations set out in the present Act. This would allow injured workers to be reasonably covered during their periods of incapacity.
Clauses 5, 165, 49, 64 Part 3 – Part 1, Division 2, Clause 5 [Return to work and Suitable Employment	We disagree with the definition of suitable employment as suggested below: *'Suitable employment'* (cl. 165) in relation to a worker with an incapacity for work means employment with any employer performing duties (suitable duties) for which the worker is suited having regard to: the nature of the incapacity with reference to medical information, the nature of the position and duties before the worker was incapacitated, the worker's age, education, skills, work experience and place of residence, any return to work program or workplace rehabilitation services in place for the worker, suitable training or vocational re-education (if the worker is paid). Suitable employment includes returning to work in a position that has been modified or created to accommodate a worker's incapacity. It also includes the position the worker was employed in before becoming incapacitated but with a modified range of duties, working days or hours. • When providing suitable employment an employer cannot provide duties that are of a merely token nature or do not involve useful work, having regard to the nature of the employer's trade or business. We believe this definition will give rise to more applications being filed at Workcover WA in relation to cessation of wages on the basis of how an individual/employer will define suitable employment. An increase in applications will be contrary to the current section 3(d) of the Act. This proposal is also silent as to the income that an injured person will receive for this "suitable" employment and whether there will be a "top up" payment if there is a discrepancy in pay or whether the injured person will have their wages ceased.
Clause 7 – Part 1, Division 3, Clause 7 [Exclusion of Injury: Reasonable Administrative Action]	The introduction at section 7 of an exclusion for *"reasonable administrative action"* includes an appraisal of the workers performance and informal counselling. We disagree with this provision and seek to remove this provision entirely. In the ***Workers Compensation & Injury Management Bill 2021 (Consultation Draft) Modernising WA's Workers Compensation Laws August 2021 Information Sheets*** it states: ***"****The current Act excludes stress related claims which result from various administrative actions (mostly disciplinary) undertaken by a worker's employer, or that are due to the worker not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment. The Bill extends this exclusion to any psychological or psychiatric disorder arising out of administrative action, as defined."* *Any psychological or psychiatric disorder that a worker experiences will not be an injury from employment if it results from administrative action (unless the administration action is unreasonable and harsh on the part of the employer).*

• *Administrative action includes general performance management, along with the other matters that are specified in the current Act relabelled as: counselling action (formal or informal), suspension action, and disciplinary action (formal or informal).*

• *Administrative action includes any of the following actions: 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 above,· 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.*

In our submission, under the present definition a large majority of stress related claims are either pended for a period of longer than 6 months or declined due to either a factual dispute, a medical dispute or an arguable s 5(4) defence. This does not limit the amount of claims made but instead increases the amount of conciliation and arbitration proceedings relating to stress claims.

It is our submission that insurers already pend or decline a stress claim unless it is clear and obvious, for instance, the injured worker has witnessed a traumatic event.

All other stress claims are usually disputed on a factual basis, a medical basis, or defended on the basis that the whole or predominant cause of the injury was an excluded matter under s 5(4). The worker is then put to proof and the Arbitration service is then required to make a determination at significant cost to stakeholders.

Often these disputes give rise to a settlement under s 92(f) which includes a resignation as a term. It remains to be seen how this will occur under the nexus of the new settlement pathways which are proposed under the new Act. Read together with the other pathways, it may be that all disputed stress claims, of which there will be many, will have to be determined at Arbitration.

The proposed changes seek to extend the ambit of the s 5(4) defence to include 'reasonable administrative action' which includes 'informal counselling'. It is unclear on what grounds that the exclusion is sought to be extended.

In our submission 'Informal counselling' is far too broad and could include a situation where an injured worker was given no fair warning, no opportunity for union or personal support and felt ambushed.

The new Bill seeks to extend the definition of discipline to include 'informal discipline' which in effect diminishes 'harsh and unreasonable' as cases will often be deemed to fall under that definition in circumstances where due process has not been followed by an employer.

It is now open to an employer who has not followed due process to state that the discipline was at the 'informal' stage and therefore if causative, makes an injury a non-compensable one.

The effect of this will be to further entrench the current status quo whereby the vast majority of stress claims are pended or declined on the basis of the extended definition.

We say that there is no need to extend the ambit of the defence when the majority of claims are already pended or declined by insurers.

That is not to say that injured workers are not successful at hearing, as 'whole or predominant' is a high threshold for the insurer to meet. The practical effect is that workers with psychological injuries do not often progress their matters to hearing due to the difficulties that they will have returning to their employer in any event, and settlement with resignation is often the most suitable outcome for all parties.

Under the extension of the definition of the defence under s 5(4) we will see more claimants at Workcover who are less able to engage in an early settlement due to the claim being declined, and thus Arbitration applications will increase.

Clause 12 and 13 – Part 1, Division 5, Clause 12 and 13 [Meaning of Worker and Employer]	Clause 12 and 13 seek to redefine the definition of worker to 'employee' for Pay-As-You-Go (PAYG) withholding under Commonwealth Taxation Law. ***In Workers Compensation & Injury Management Bill 2021 (Consultation Draft) Modernising WA's Workers Compensation Laws August 2021 Information Sheets*** it states: *All persons who are employees for the purposes of PAYG tax will be covered as workers in the workers compensation scheme. This replaces the two-limb definition of 'worker' which defines a worker as a person engaged under a contract of service or contract for service. Regulations may bring other work arrangements under the Act by prescribing classes of worker and employer where no PAYG obligation applies. Working directors and licensed jockeys will continue as deemed workers in the Act with no material change to the circumstances and conditions under which the legislation applies to them.* It is our respectful submission that the proposed change lacks certainty in respect to the proposed regulations extending the ambit of the definition that have not yet been sighted. In any event, we say that any amendment should seek to extend the present definition so that 'gig economy' workers should be covered. It is against the purposes and the object of the Act to exclude an increasing component of the workforce. The stated intention of the amendment is to modernize the workers compensation legislation. If that is the case, the Act should be seeking to extend the definition of worker so that there is no further ambiguity about the status of workers. We submit that the effect of the PAYG definition will increase 'sham contracting' by which employers seek to exclude their genuine workers by restructuring their pay arrangements or work status to avoid workers compensation liability. The present definition is well defined by the courts and allows decision makers to consider all relevant indicia to ascertain whether a worker is truly a worker for the purposes of the legislation.
Clause 30, 37-45 – Part 2, Division 2 [Requirement when Decision on Liability Deferred, and Provisional Payment]	Clause 30, 37 – 45 allows for the introduction of provisional payment obligations. Where a liability decision has not been made within the prescribed timeframe, new provisions will result in deemed acceptance of liability and an obligation to make provisional payments. The relevant part is well intentioned, and we welcome a provisional payment scheme in circumstances where workers have not had their claims accepted. However, it is our respectful submission that in practice pended notices will not be issued and a declination notice will be issued in almost all circumstances in which a claim is not obvious. There is no requirement for an insurer to be wedded to its declination notice in dispute resolution proceedings. Therefore, it is open for an insurer to decline a claim on the basis of a factual dispute or by denying that an injury has occurred as defined under the Act without this declination being particularised. What will flow from this is that conciliation applications will be immediately lodged upon receipt of the notice. Disputes will not be able to be settled at conciliation as a result of the new limited settlement pathways. This will invariably lead to an already congested arbitration service becoming overloaded with matters and further delays impacting all stakeholders. This unfortunately is another potential contravention of the proposed new clause 306 which has been set out below: *Clause 306. Object of this Part [WCIMA s. 177] states: The object of this Part is to provide a fair and cost effective system for the resolution of disputes under this Act that —* *(a) is timely; and* *(b) is accessible, approachable and professional; and* *(c) minimises costs to parties to disputes; and* *(d) in the case of conciliation — leads to final and appropriate agreements between parties in relation to disputes; and*

	(e) in the case of arbitration — enables disputes not resolved by conciliation to be determined according to their substantial merits with as little formality and technicality as practicable.
Clause 34 – Part 2, Division 2, Clause 34 [Authority for Collection and Disclosure of Information]	It is suggested that a new consent authority mechanism be introduced to replace the consent authority found in the current form 2B and Certificate of Capacity. Each individual has a right for their private information to be protected at all times. This is enacted in the Privacy Act 1988 (Cth). It is anticipated that an authorised discloser will not be in a position to determine what "*relevant information"* will be required when requested and will result in the entire document being released. We disagree with this proposal and suggest that the current optional medical authority should remain in its present form in the Form 2B. The waiver of the optional part on the Form 2B can lead to unnecessary enquiries unrelated to the injury claimed. The disclosure of non-injury private and personal information can have ramifications for the injured person and can cause an aggravation of their present psychiatric condition. In addition, it protected confidential private medical information from being disclosed. Should a request for information/history be sought by the insurer for purposes of investigating liability of a claim, such a request could be accommodated by obtaining an authority from the injured worker for each specific doctor or medical provider. Each authority sought can then be considered by the injured worker based on the facts and reasons for the request. Removing the right of every injured worker to revoke their authority will result in an abuse of process. We have not been provided with the Regulations which are to deal with the form and manner of collection and disclosure of relevant information and any limitations associated with the collection of "relevant information". The reference made to "Relevant information" is too broad and is subjective. The entity requesting access to certain medical and personal information which may be relevant (notwithstanding it could refer back many years to an old medical condition), would allow that entity access to that personal medial information. This is contrary to an individual's right to protect their private information. Disputed matters which have been progressed to the arbitration stage would be the forum to make submissions by way of interlocutory application as to the relevance of seeking access to medical and personal information. Accordingly, we submit that Clause 34 should not be included and should be removed.
Clause 54-60, 553 Part 2, Division 3, Clause 54 Calculation of Income Compensation	Section 49- the method by which weekly payments are calculated for total or partial incapacity for work. Section 49(3) and (4) seem to suggest that when determining the amount payable for a partial incapacity payment, pre-injury overtime payments, bonuses and allowances are not to be considered. Subdivision 3, sections 54 to 59 – the provisions replacing Clauses 11 to 15 in respect of the calculation of weekly payments. While section 55 is a step in the right direction given it calculates payments over the 52 week period prior to the date of injury and includes all earnings received over that period (including in concurrent employment), s 56(3) will reduce all workers weekly payments by 85% from the 26th week and onwards. This is unacceptable and is not supported. It appears that the intention is to have all workers wages reduced by 15% notwithstanding that different workers in numerous occupations are the subject to negotiated contracts industrial awards.

	• Further, section 57 retains the current Amount C which is unjust, particularly given the number of workers employed in a mine site setting earning well in excess of the current Amount C. • In relation to the prescribed amount, while it is positive that it is proposed to double the prescribed amount for medical expenses, there is no change to the overall weekly prescribed amount or to the current caps on common law damages.
Clause 64-68 Clause 65 – Part 2, Division 3 [Reducing or Discontinuing Income Compensation	Whilst it appears that the proposed clause 65 is similar to section 61 of the Act, there is a clear change of wording which we submit is too broad and it is anticipated that it would unnecessarily affect the rights of injured workers. The present section 61 provision provides that a Form 5 Notice must be served on an injured worker which includes a medical report certified by a medical practitioner, that the injured worker has total or partial capacity to work or that the incapacity is no longer a result of the injury. A copy of that certificate or report, was required to set out the grounds of the opinion of the medical practitioner. Whilst Clause 65 provides that the injured worker's income cannot be reduced and/or discontinued unless medical evidence is obtained from a medical practitioner setting out: a) "*the worker's capacity to work"; or* *b) "the extent to which the worker's incapacity to work is a result of the worker's injury"*. We submit that the word "*extent*" in section 65(1)(b) will likely allow employers to serve notification on the injured worker and will capture a much wider range of circumstances and issues upon which it will rely for purposes of having the injured worker's payments reduced, suspended or discontinued. We are of the view that the existing provision set out in section 61 in the current Act should be retained. In respect to clauses 65(4) and (5), we submit that the proposed changes provide an Arbitrator with a far wider discretion to determine applications made in respect to the reducing or discontinuation of weekly compensation payments. Section 61(4)(a) in its present form provides an Arbitrator with specific criteria to take into consideration when determining the Application for the reducing, suspending and/or discontinuing of payments. It appears that the Arbitrator's powers have been extended for a Determination to be made, with a much wider discretion to determine the Application as they see fit. Clause 65(5) provides that the Arbitrator when determining the amount of any income compensation payments, can take into consideration whether a return to work program has been established for the worker and to assess the participation by the worker in that return to work program. This raises a whole number of circumstances where there may be numerous reasons why an injured worker has not engaged in a return to work program of no fault of their own, and it is submitted that it just goes beyond the scope of a section 61 dispute.
Clause 162 – Part 3, Division 2, Clause 162 [Duties of Worker]	We submit that the proposed subsection (4) of Clause 162 be deleted. We support clauses 170 and 171 in respect to the injured worker attending a medical practitioner of the worker's choice for purposes of a medical examination. It is noted that part of the specified functions set out in the proposed clause 170 for medical practitioners is to advise on the suitability of, and to specify restrictions on, duties the worker may be expected to perform and advise on the development of a return to work program. We are of the view that wording in s170 (3) (f) *"and in return to work case conferences"* should be deleted.

Clause 164 – Part 3, Division 2 [Attendance at Return to Work Case Conference]	Work Case Conference – The Bill provides for workers to participate in a case conference if arranged by the employer, employer's insurer or the worker's treating medical practitioner. It will be a requirement to give notice setting out the time and place of the conference and if the worker needs to attend in person or by other means. The worker, should not, at any time be required to attend a case conference with his\her doctor and an employer or insurer for any reason unless the worker consents to the attendance. An unrepresented worker has no knowledge in regard to a workers' compensation claim and what 'questions of liability' would mean in the context of attending a case conference. In the event that the insurer requires guidance from the worker's doctor in regard to *'injury management'*, the insurer could request a report from the doctor requesting specific information about what restrictions should be in place, the nature of the work duties the injured worker is able to trial, and the hours of work manageable by the worker. An unrepresented injured worker may willingly provide information which was not required to be provided despite the proposed clause 164(3) making refence to regulations which *"may provide:* *(c) the matters that may be discussed at a return to work case conference".* The proposal is silent in respect to the ramifications of represented workers having their lawyers attend such case conferences. There is no provision in the cost scale which would allow the extra and required services to be provided by representatives in attending these conferences. There is no reference in the proposed Bill to allow injured workers' and insurers' representatives to attend the case conferences. It is unreasonable to expect the worker and his/her doctor to manage precisely what questions and information they may or may not share in respect to issues pertaining to questions of liability, causation and general evidentiary information. It is our view that it would be necessary for a workers representative to attend such a conference to ensure the issues of causation, liability and general evidence is not shared by the worker and that the discussion is limited to 'an injury management case conference'. It is unfair to expect an injured worker who may be extremely stressed due to the circumstance of their case to front up with their employer present together with the insurer. It is not uncommon for an injured worker to have a dispute with their employer about the way in which they have been treated or the failure to implement a safe system of work or may have been bullied by a staff member of that employer. How can it be expected for the injured worker to attend such a case conference? The proposed clause has potential to aggravate an injured worker's mental condition in circumstances where the system itself is challenging with the future work capability of each worker in question. There is uncertainty as to what the regulations may be prescribing in respect to the conduct, matters to be discussed, persons who may attend or participate and the general format of the case conference which is concerning. It is our view that the present process in respect to injury management should continue in its present form. It is open to all parties to request information from the injured workers medical practitioner in relation to return to work and injury management.
Clause 420 - Settlement Part 7, Division 2, Clause 420 [No Damages	It is suggested that the common law settlement pathway (s92(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 of June 2021. The report refers to historical data of applications lodged at WorkCover and the duration and actual numbers of those applications which have been monitored through to the decisions stage. It is reported on Page 20 that for the period of December 2020 – June 2021

if Compensation Settlement Agreement Registered]	the proportion of arbitrations by duration from the last formal Arbitration hearings to completion was more than 16 weeks and has increased by 47%. The number of conciliations with subsequent arbitration applications being lodged from December 2020 – June 2021 were listed as 652 applications. From December 2020 – June 2021, 206 matters attended Pre-Arbitration hearings. The above statistics show an increase in claims for a period of six months and there is significant delay in obtaining decisions following Arbitration hearings. At present time listings for arbitration hearings are between 6 to 8 months. 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 92F deeds for disputed claims the delay will be extended, and the costs associated with the process will also be significantly increased. This is contrary to the principles of the Act and is contrary to section 3(d) of the current Act as the proposed pathways in relation to settlements is not *'fair, just, economical, informal and quick'*. The pre-arbitration conferences will become obsolete as the success of these conferences were based on parties entering into 92(f) deeds of settlement to avoid the risk to all parties having the liability dispute determined at the Arbitration Hearing. The Deeds facilitated a resolution of the dispute with liability remaining declined. The proposal is also directly in contravention of the proposed new clause 306 which has been set out below: *Clause 306. Object of this Part [WCIMA s. 177] states: The object of this Part is to provide a fair and cost-effective system for the resolution of disputes under this Act that —* *(a) is timely; and* *(b) is accessible, approachable and professional; and* *(c) minimises costs to parties to disputes; and* *(d) in the case of conciliation — leads to final and appropriate agreements between parties in relation to disputes; and* *(e) in the case of arbitration — enables disputes not resolved by conciliation to be determined according to their substantial merits with as little formality and technicality as practicable.* The present 92(f) provision allows the parties to resolve the issues relating to liability in a relatively quick and economical manner at the conciliation stage, without the need to progress the matter to the arbitration process and in circumstances where a matter has to be progressed to the next stage, the parties have the ability to resolve the dispute informally and at the pre- Arbitration stage. It is anticipated that the workers compensation insurers and the advice received from their panel of lawyers will not change. Therefore disputed liability matters will need to progress to an Arbitration determination. Injured workers are not going to discontinue their claims and insurers are going to continue to dispute claims. The whole conciliation process will be questionable as the applications will need to be progressed to formal hearings for determinations. More arbitrators will need to be appointed and the entire process will be unreasonably extended whilst injured workers will be required to wait for long periods of time for the determination outcomes. The emotional costs to injured workers will increase and it is anticipated that the financial costs in the workers compensation system will increase drastically to facilitate the increase in applications having to be progressed to hearings which require determinations. Accordingly, we submit that this clause should not be introduced and that the present mode of resolving disputed claims should remain in place.