Insurance Council of Australia

30 November 2021

Mr Chris White
Chief Executive Officer
WorkCover WA
2 Bedbrook Place
SHENTON PARK WA 6008

Via Email: consultation@workcover.wa.gov.au

Dear Mr White,

Workers Compensation & Injury Management Bill 2021 (Consultation Draft)

The Insurance Council of Australia (**ICA**), on behalf of its insurer members (**Insurers**) welcomes the opportunity to provide comment on the *Workers Compensation and Injury Management Bill 2021 (Consultation Draft)* (**Draft Bill**). We confirm the extension granted to the ICA to provide written submissions upon the Draft Bill to **30 November 2021**.

The ICA and Insurers share WorkCover WA's commitment to ensuring that the Workers Compensation Scheme (**the Scheme**) performs optimally and is implemented to best meet the needs of injured workers, employers, and businesses in Western Australia.

Please find **attached** a table containing industry feedback on specific aspects of the Draft Bill. Please note that references to clauses are to those in the Draft Bill, and references to sections are to the provisions of the current *Workers Compensation and Injury Management Act 1981* WA (**Current Act**).

We do not propose making any specific comment in relation to the Draft Bill's application to self-insurers.

In the interests of the long term sustainable performance of the Scheme, we take this opportunity to provide you with an overview of comments in relation to several aspects of the Draft Bill which are of particular concern; these concerns (amongst others) are set out in further detail in the table.

- Clause 37: the ICA considers the proposed 28 day timeframe for the provisional payments day is inadequate. The ICA proposes a 42 day timeframe as more reasonable and realistic;

- Removal of section 92(f) mechanism for settlement of disputed claims: the ICA considers the removal of the mechanism will be detrimental to the Scheme and to stakeholders (including workers) and will impose unnecessary burdens and costs upon the Scheme. The ICA has proposed amendments to the Draft Bill to address this (in the table);

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- Clause 56: income compensation not to step down until 26 weeks. The ICA's primary concern is that this proposal would not support positive return to work outcomes for injured workers, thereby potentially undermining an overarching objective of the worker's compensation scheme.

- Clause 78: the ICA considers that the standard increase to the sum available for medical and health expenses (by 40%) is unnecessary, given the proposed Clause 76 already doubles the initial amount available for medical and health expenses. The ICA has therefore proposed the removal of clause 78 in full;

- Clause 165: the ICA considers the definitions of suitable employment and suitable duties in the Act require significant amendment (as proposed in the table);

- Clauses 235 and 236: refer to our submissions regarding these clauses and the proposed Scheme for performance monitoring and review of, and issuing and publication of improvement notices to, licensed insurers; and

- ICA and its members raise queries regarding the operation of, and provision of actuarial data in respect of, the operation of the Default Insurance Fund (including its operation to claims arising from acts of terrorism) and the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund.

The ICA and its members are of the view that to best meet the overarching objectives of the Scheme, these aspects of the Draft Bill require further consideration given their significant impact on the Scheme as a whole.

We also note that the effect and application of many of the proposed clauses of the Draft Bill will turn upon the Regulations to the Draft Bill, which are yet to be distributed or made available for consideration. The ICA has therefore not provided or attempted to provide finalised feedback on issues or clauses that are subject to the (as yet unknown) Regulations.

We appreciate WorkCover WA's undertaking to allow for further review and analysis once the Regulations have been drafted, and the ICA would welcome participation in further consultations on the Regulations to the Draft Bill.

The ICA and its members note that some administration changes within the draft legislation will increase WorkCover WA's powers and potentially alleviate delays in some areas with seeking ministerial approval. We seek a continuation of the consultative approach which has historically been in play in Western Australia.

The changes proposed by the new legislation are significant in scope and nature and ICA and its members also recommend that WorkCover WA plan a review of the impact and/or consequences of the proposed changes three (3) years post implementation.

The ICA and its members note that the changes will increase the financial strain on Insurers, particularly through increased liabilities created through the extension of the Default Insurance Fund and the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund levied on Insurers.

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We further note that the ICA and its members also seek data/actuarial costings with respect to a number of key proposed changes – the areas in which this detail is sought are listed in our submission.

We trust that our submission is of assistance to WorkCover WA in shaping the Workers Compensation Scheme to best achieve the objectives of optimal recovery, return to work activity and enhancing quality of life outcomes for injured people. We look forward to working with WorkCover WA further regarding these and any other relevant aspects of the Draft Bill.

We are available to discuss our submission and any questions that may arise in more detail at your convenience.

Please do not hesitate to contact me or [redacted] if you have any queries regarding our submission.

Yours sincerely

Andrew Hall
CEO & Executive Director

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Consultation Draft Bill	Equivalent provision of Current Act (where relevant)	ICA Submission
Exclusion of injury in 'stress' claims: reasonable management action (clause 7) *"(1) In this section, administrative action includes any of the following actions —* *(a) an appraisal of the worker's performance;* *(b) counselling action (whether formal or informal);* *(c) suspension action;* *(d) disciplinary action (whether formal or informal);* *(e) anything done in connection with an action described in paragraph (a), (b), (c) or (d);* *(f) 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.* *(2) A psychological or psychiatric disorder, including any physiological effect of the disorder on the nervous*	**Terms used** (section 5(4)) Section 5(4) provides that a disease caused by stress is not an 'injury' if the stress wholly or predominantly arises from one or more of the following matters, unless (in respect to the matters set out in paragraph (a) or (b) the action is unreasonable and harsh on the part of the employer: *(a) the worker's dismissal, retrenchment, demotion, discipline, transfer, or redeployment; and* *(b) the worker's not being promoted, reclassified, transferred, or granted leave of absence or any other benefit in*	ICA supports clause 7 generally. However, ICA submits the omission of any reference to dismissal, retrenchment, demotion or redeployment within the definition of 'administrative action' in clause 7(1) may lead to unintended consequences. Of note, ICA submits a reasonable requirement for dismissal/ retrenchment/ demotion/ redeployment may arise in response to business needs (e.g., altered staffing requirements in light of COVID-19 pandemic) independently of and unrelated to discipline of, or the performance of, particular workers. The purpose of clause 7 may be frustrated without this inclusion. **Proposal**: amend proposed clause 7(1) to provide: *"(1) In this section, administrative action includes any of the following actions —* *(a) an appraisal of the worker's performance;* *(b) counselling action (whether formal or informal);* *(c) suspension action;*

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system, that a worker experiences is not an injury from employment if it results wholly or predominantly from *(a) administrative action, not being administrative action that is unreasonable and harsh on the part of the employer; or* *(b) the worker's expectation of administrative action or of a decision by the employer in relation to administrative action."*	*relation to the employment; and* *(c) the worker's expectation of:* *(i) a matter; or* *(ii) a decision by the employer in relation to a matter;* *referred to in paragraph (a) or (b).*	*(d) disciplinary action (whether formal or informal);* *(e) **action to dismiss, retrench, redeploy or demote the worker**;* *(f) anything done in connection with an action described in paragraph (a), (b), (c), **(d) or (e);*** *(g) 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."*
Definition of 'worker' where earnings are below minimum PAYG withholding threshold (Clause 12) Clause 12(2) relevantly provides that: *"An individual is a worker for the purposes of this Act if payment of salary, wages, commission, bonuses or allowances to the individual is subject to PAYG withholding as a payment to the individual as an employee."*	**Section 5 of Current Act** Substantially changed definition.	ICA is concerned that workers whose earnings are below the threshold for PAYG withholding (under taxation laws) may not fall within the definition of 'worker' and that this (presumably unintended, inadvertent) omission may have an adverse impact on low income employees. While notes to section 12 indicate that a determination whether an individual is a 'worker' will turn on whether a payment is subject to PAYG withholding, and not whether the employer did in fact attend to PAYG withholding, ICA's concern is that where a worker's earnings are below the withholding threshold, it is arguable that the payment is not subject to PAYG withholding.

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		Proposal: amend clause 12(2) to provide that: *"An individual is a worker for the purposes of this Act if payment of salary, wages, commission, bonuses or allowances to the individual:* *(a) is subject to PAYG withholding as a payment to the individual as an employee; or* (b) ***would, if the payment was sufficient to satisfy the minimum threshold for application of PAYG withholding, be subject to PAYG withholding as a payment to the individual as an employee ."***
Definition of 'worker': impact on premium pools in certain industries Refer changes to definition of 'worker' introduced by proposed clause 12 (above).	Substantially changed definition as noted above.	ICA and its members consider that the substantial change to the definition of 'worker' will have a significant effect upon the identification of 'employers' in, and consequently the premium pools available in certain industries, with flow-on effects upon scheme rates, employers and licensed insurers. ICA invites and requests consultation with WorkCover WA on this point (whilst acknowledging that the content of the proposed Regulations, yet to be made available, may address these concerns).
Definition of 'employer' where entity contracts its payroll obligations to a third party	**Section 5 of Current Act**	Under the Current Act, it is the contractual relationship between the worker and employer for the performance of work, not the identity of the payer of wages or monies, that is relevant in

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(clause 12) Clause 12 relevantly provides that: *(2) An individual is a worker for the purposes of this Act if payment of salary, wages, commission, bonuses or allowances to the individual is subject to PAYG withholding as a payment to the individual as an employee.* *(3) The person who makes the payment is the worker's employer for the purposes of this Act.* *(4) The regulations may modify the effect of this section as to who is a worker's employer in a specified case or circumstance.*	'Employer' is currently defined to include "*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*."	identifying the employer. Established case law confirms that the mere fact that an intermediary paid the monies in question does not render the intermediary the 'employer' for the purposes of the Current Act. However, under the proposed clause 12 of the Draft Bill, the 'employer' is now to be identified as the entity who made the payment to the employee, regardless of whether the other indicia of an employment relationship are satisfied, and presumably it follows that a mere intermediary attending to payment may now be identified as the 'employer' for all purposes of the legislation, subject only to the content of Regulations to be published under clause 12(4). ICA and its members are concerned that entities who otherwise satisfy the indicia of an employment relationship, but who outsource their payroll obligations to a third party, may be found not to fall within section 12 (and rather the third party, which may be uninsured, may be found to be the 'employer' for legal purposes). In ICA's submission this outcome would be detrimental to the intention and operation of the scheme as a whole. **Proposal**: ICA strongly recommends amendment of clause 12 to address this issue, or at the least, that the Regulations (yet to be published) address this (and again, ICA and its members urge

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		consultation regarding the draft Regulations at the earliest possible stage).
Provisional payments (clause 37) Clause 29 provides that within 14 days of a claim being given to an insurer, the insurer must give a notice accepting, not accepting or deferring a decision on liability for the claim. Clause 30 provides that where an insurer gives a deferred decision notice within the 14 day period specified in clause 29, "*the insurer must give a liability decision notice for the claim as soon as practicable and in any event before the day prescribed by the regulations for this section (the **deemed liability acceptance day**)*." Information sheets published by WorkCover WA in August 2021 in respect of the Draft Bill (**WorkCover's Information Sheets**) indicate that the deemed liability acceptance day is likely to be 90 days from when the claim is given to the insurer. Clause 37(1) then provides that if an insurer "*gives a deferred decision notice for a worker's claim but has not*	No equivalent in Current Act	ICA strongly submits that the timeframe proposed for the provisional payments day is inadequate, and will give rise to unintended consequences and greater scheme costs. **Proposal**: a timeframe of **42 days** after the insurer's receipt of the worker's claim is a more suitable and realistic timeframe. ICA submits a 28 day timeframe is inadequate having regard to the following: • of note, the proposed timeframe is 28 days from the insurer being given the claim (**not** 28 days from the giving of a deferred decision notice); • a decision on liability for a claim often involves investigation of factual issues and/or questions of medical history and opinion; • decisions on questions of fact are likely to take in excess of 28 days from the insurer's receipt of the claim, noting, for example: ○ investigating whether a claimant is a 'worker' (and whether the entity insured is an 'employer') as defined in the draft Bill will involve obtaining and scrutinising contracts of employment and PAYG

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*given a liability decision notice for the claim before the day prescribed by the regulations as the **provisional payments day**, the employer is required to make provisional payments as provided by this Subdivision."* WorkCover's Information Sheets indicate that the provisional payments day is likely to be 28 days after receiving the worker's claim.		records including, potentially, records from parties other than the entity insured; ○ determining liability in claims where it is not immediately apparent whether a worker has sustained personal injury by accident, or whether the worker was in the course of their employment at the time, often requires taking of statements from the worker and witnesses/ other personnel; ○ this is also the position where a claim is made for psychological/ psychiatric disorder, investigating whether the disorder is or is not attributable to reasonable administrative action; • perhaps more significantly, a 28 day period is a manifestly inadequate timeframe to make a decision on liability where medical issues of any complexity are involved, and of note: ○ where a claim gives rise to questions of medical causation, for instance, whether the employment has or has not contributed to a significant degree to the recurrence, aggravation or acceleration of a pre-existing disease, historical medical records are often required to make a liability decision; ○ while the ICA (subject to the content of the proposed prescribed regulations) supports the authority

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		conferred by clause 34 for collection and disclosure of information, in practice, repeated follow-up requests to busy general practitioners are often required before medical records are disclosed; ○ in practice, it is not realistic to arrange medical examination pursuant to clause 183, and to receive and consider any resulting report, within the proposed 28 day period, particularly where it is necessary for the medical practitioner to consider historical medical records in order to form an opinion. ICA submits the unintended consequences of a 28 day timeframe will include: • insurers issuing notices not accepting liability for a claim, where the information reasonably required to make a decision on liability cannot be gathered before the expiry of the provisional payments day; ○ as a result, premature applications by workers seeking determinations of liability, where in reality the insurer's investigation process is still ongoing; ○ imposing an additional burden upon WorkCover's Conciliation & Arbitration Services, contrary to the objectives of clause 306; and

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		○ with increased legal costs likely to be incurred as a result of increased litigated disputes, thereby increasing scheme costs; or • alternatively, insurers issuing notices accepting liability for a claim where the information reasonable required to make a correct decision could not be gathered before the expiry of the provisional payments day: ○ as a result, workers who (as shown by information subsequently received) have not sustained a compensable injury will be entitled to compensation payments, which (in the absence of consent from the worker) will continue until the outcome of a litigated dispute instituted by the employer/ insurer; ○ thereby providing encouragement for the making of potentially frivolous claims; and ○ leading to increased scheme costs and increased litigated disputes, contrary again to the intent of clause 306.
Income compensation not to step down until 26 weeks (Clause 56)	**Schedule 1: compensation entitlements**	ICA does not support the increase from 13 to 26 weeks before step-down in income compensation to 85% of the initial rate.

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Clauses 56(2) & (3) provide for a worker's income compensation rate to decrease after a 26 week period: *"(2) To the extent that the payment of income compensation is for a period within the first 26 weeks in which income compensation is payable to the worker, the amount is calculated at the worker's pre-injury weekly rate of income except as otherwise provided in section 57 or 58.* *(3) To the extent that the payment of income compensation is for a period after the first 26 weeks in which income compensation is payable to the worker, the amount is calculated at 85% of the worker's pre-injury weekly rate of income except as otherwise provided in section 57 or 58."*	Schedule 1 clause 11(3): where worker's earnings are prescribed by an industrial award, reduction from Amount A to Amount AA after 13 weeks of weekly payments. Schedule 1 clause 11(4): where worker's earnings are not prescribed by an industrial award, reduction from Amount B to 85% of Amount B after 13 weeks of weekly payments.	ICA's concern is: • workers who are otherwise able to do so will have no incentive to return to work before 26 weeks have passed; • this is of particular concern given research is indicative that the longer a worker is away from their workplace, the lower the prospect of a successful return; • thus this change, in combination with the introduction of provisional payments, is likely to increase claims longevity and claims costs. Proposal: amend clause 56(3) to refer to 13 weeks (not 26). ICA would be pleased to provide references to research supporting the health benefits of an early return to work, if requested.
Repeal of Section 60 See Part 2, Division 2, Subdivision 4: Reducing, suspending and discontinuing income compensation (Clauses 63 to 69)	**Discontinuing or reducing weekly payments, order as to** (Section 60) *"(1) Where weekly payments are made to a worker pursuant to this Division, the employer may apply at any time for an order of an arbitrator*	ICA does not support the removal of section 60. Under the current Act, sections 60, 61 (service of medical certificate) and 62 each provide a separate and distinct pathway for an employer to seek the suspension, reduction or discontinuance of weekly payments.

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The Draft Bill contains no equivalent to section 60 of the Current Act.	*that such payments be discontinued or reduced.* *(2) If the employer satisfies an arbitrator that there is a genuine dispute as to liability to pay compensation or as to the proper amount of such weekly payments, and in either case of the grounds of the dispute, the arbitrator may order that the payments be suspended for such time as the arbitrator directs or be discontinued or be reduced to such amount as the arbitrator thinks proper or the arbitrator may dismiss the application."*	Each provision has a discrete function to perform. It has been acknowledged that as a result, section 60 fills what would otherwise be a lacuna in the current statutory scheme: refer *State of Western Australia (Department of Education) v Leek* [2014] WADC 10 (***Leek***) (at 87). The importance of the function which section 60, and section 60 alone, provides was recognised by the Full Court of the Supreme Court of Western Australia in *Taylor v Star Broken Meats* (unreported, 26 August 1992, B29201055) where it was noted (Rowland J) that the provision is intended "*to give some protection to the employer where he can satisfy the Board that there is a genuine dispute as to liability or quantum*", with an acknowledgment that otherwise "*the employer is unlikely to recover money already paid*" in the time leading up to e.g. an application pursuant to section 62 of the current Act. The facts of and decision in the *Leek* case demonstrate the continued importance of section 60 and the critical function it fulfils. The Draft Bill replicates sections 61 and 62 of the Act, yet proposes repeal of section 60 altogether. ICA submits this would leave a void in the legislation, to the detriment of the scheme.

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		Moreover, ICA submits that the function played by section 60 will be even more critical following the introduction of the provisional payments scheme contained in the Draft Bill. Licensed insurers will be more comfortable accepting liability for claims based on information available before the provisional payments day, if they can be confident that there is a mechanism available for prompt interlocutory review and relief if evidence subsequently comes to hand giving rise to genuine doubts surrounding liability for the claim. **Proposal**: amend clause 69 to include a **new clause 69(3) and renumbered clause 69(4)** as follows: *"(3) On a review under this section, if the employer satisfies the arbitrator that there is a genuine dispute as to liability to pay income compensation, the arbitrator may make any order for the payment of income compensation to the worker to be suspended or adjusted as the arbitrator considers appropriate.* *(4) The arbitrator's order has effect from the day specified in the order and, in the case of a suspension, until such day or such time as is specified in the order.*"
Increase in limit on compensation for medical and health expenses from 30% to 60% of general maximum amount	**Schedule 1: compensation entitlements** Schedule 1 clause 17(1) currently caps compensation for equivalent	ICA does not support the increase in the allowance for medical expenses from 30% to 60% of the general maximum amount.

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(clause 76) "*The total amount of medical and health expenses paid in respect of a worker's injury must not exceed the medical and health expenses general limit amount*." Clause 70 defines this amount to be "*60%, or a greater percentage, if any, prescribed by the regulations, of the general maximum amount*." The general maximum amount is equivalent to the prescribed amount under the current Act: refer clause 537(1).	expenses under the current Act at 30% of the prescribed amount. Clause 76 therefore increases the current cap by 100%.	ICA submits this increase is unreasonable when considered in conjunction with proposed clauses 78, 79 and 82-92 of the Draft Bill: • clause 78 (replicating the current 'first extension' to the prescribed amount for medical expenses) is unnecessary, as the increase allowed in clause 76 (from 30% to 60% of the prescribed amount) addresses any shortcomings in the scheme provided in the current Act; • clauses 76 and 78 combined allow for payment of medical expenses (applying the current prescribed amount/ general maximum amount) of over $200,000, which ICA submits is excessive given these provisions impose no firm criteria for their application, and impose no requirement that a worker establish any level of permanent impairment to claim these expenses. **Proposal: ICA proposes:** (1) Retain clause 76. (2) Remove clause 78 in full. ICA also requests provision of any actuarial costing data relied upon by WorkCover WA to support the increase from 30% to 60% of the maximum general amount, for the purpose of further consideration and further submissions if necessary.

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"Standard" increase in limit on compensation for medical and health expenses by a further 40% (clause 78) A worker may apply for an increase in the medical and health expenses general limit amount at any time, provided that the worker has incurred or is likely to incur the expenses, and the increase should be allowed, having regard to the social and financial circumstances, and reasonable financial needs, of the worker. Capped at 40% of the medical and health expenses general limit amount (i.e., a further 24% of the general maximum amount). Refer also definitions in clause 70.	**Schedule 1: compensation entitlements** Equivalent to schedule 1 clauses 18A(1) and (1a) of the Current Act, however: • the current provisions cap the increase at the sum of $50,000 (whereas clause 78 would currently allow an increase of over $57,000); • the current increase is inclusive of travel expenses and miscellaneous expenses (as opposed to the new Part 2 division 5: see below).	As stated above (refer clause 76), ICA does not support the inclusion of clause 78, and again submits that clause 78 is unnecessary in circumstances where the capped amount available for payment of medical and health expenses (before any extension) will already be been increased by 100%, by virtue of clause 76%. ICA considers allowing both clauses to stand will increase scheme costs, to the detriment of the scheme overall. As above, **ICA proposes:** (1) Retain clause 76. (2) Remove clause 78 in full. ICA further requests provision of any actuarial costing data relied upon by WorkCover WA to support the requirement for a further increase in 'standard' cases to the cap on medical and health expenses, over and above the increase from 30% to 60% of the maximum general amount proposed in clause 76, for the purpose of further consideration and further submissions if necessary.
Further increase in limit on compensation for medical and health expenses, for special expenses (by a further 190%) (clauses 79)	**Schedule 1: compensation entitlements** Equivalent to schedule 1 clause 18A(1b) of the Current Act, however:	ICA supports clause 79 but submits that the increase in the allowance for medical and health expenses should be inclusive of, not additional to, miscellaneous expenses (see Part 2, Division 5 below).

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Where a worker has exhausted the initial amount and the first extension for medical and health expenses under clauses 76 and 78, the worker may apply for a further increase, provided that the worker: • has a degree of whole of person permanent impairment (WPI) of at least 15%; and • has incurred or is likely to incur "special expenses" as defined in section 70. Capped at 190% of the medical and health expenses general limit amount (i.e., 114% of the general maximum amount, currently over $270,000)	• the current provisions cap the increase at the sum of $250,000 (whereas clause 79 would currently allow an increase of over $270,000); • the current increase is inclusive of travel expenses and miscellaneous expenses (as opposed to the new Part 2 division 5: see below).	ICA submits the clauses of the Draft Bill allowing workers satisfying the relevant criteria to participate in the catastrophic injuries support scheme already provide adequately for the medical needs of workers with catastrophic injuries, and that providing for uncapped 'miscellaneous expenses' whilst also providing an additional sum for 'special' expenses,' particularly in circumstances where clause 76 already doubles the initial amount available for medical and health expenses, is unnecessary and unreasonable. **Proposal: ICA proposes:** (1) Retain Part 2, Division 5; (2) Amend clauses 70 and 79(4) as follows: Amendment to clause 70, definition of 'special increase limit amount': *'special increase limit amount means the amount that is 190%, or a greater percentage, if any, prescribed by the regulations, of the medical and health expenses general limit amount, to be calculated after deducting any miscellaneous expenses paid by the employer or insurer."* Amendment to clause 79(4): *"(4) The amount of a special increase:* *(c) applies only for the payment of special expenses;*

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		(d) must be decided after taking into account the amount of any miscellaneous expenses the employer or insurer has paid to or on behalf of the worker; *(e) must be decided after taking into account the amount of any payment for medical and health expenses that, since the most recent standard increase, the employer or insurer voluntarily made to the worker beyond the general limit for the claim; and* *(f) is limited by the requirement that the increase (or the total of all special increases), together with any amounts required by paragraphs (b) and (c) to be taken into account, must not exceed the special increase limit amount."*
Effect of participation in catastrophic injuries support scheme Clause 81 provides that: *"The employer of a worker ceases to be liable for medical and health expenses compensation to the extent that the compensation is for expenses incurred or to be incurred after the worker becomes a participant in the catastrophic injuries support scheme under the*	No equivalent in current Act	ICA concern: Clauses 81 and 93 do not provide any mechanism for the employer (and its insurer) to recover medical and health expenses compensation, and miscellaneous expenses compensation, paid to the injured worker before they became a participant in the catastrophic injuries support scheme (**CISS**) from the CIF or otherwise. Further, there is ambiguity in clauses 81 and 93 which do not clarify whether a worker who participates in the CISS, but then later ceases participating in CISS, can from the date they cease

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Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016." Clause 93 is in similar terms in respect of regarding miscellaneous expenses compensation, providing that: *"The employer of a worker ceases to be liable for miscellaneous expenses compensation to the extent that the compensation is for expenses incurred or to be incurred after the worker becomes a participant in the catastrophic injuries support scheme under the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*."		participating in CISS, once again claim medical and health expenses and miscellaneous expenses compensation from the employer and its workers compensation insurer. ICA suggests this was not the intent of the clauses, but may be the favoured interpretation in the event of a dispute (given the beneficial nature of workers' compensation legislation, to be interpreted in favour of the worker in the event of ambiguity). **Proposal**: ICA proposes amendment of clauses 81 and 93 to address these issues as follows: **Clause 81** *"Where a worker becomes a participant in the catastrophic injuries support scheme under the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*, the employer of the worker: *(a) ceases to be liable for medical and health expenses compensation to the extent that the compensation is for expenses incurred or to be incurred after the worker becomes a participant, irrespective of whether or not the worker later ceases to be a participant; and* *(b) is entitled to recover medical and health expenses compensation paid to or on behalf of the worker by the employer prior to the worker becoming a participant from*

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		the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund [established under clause 299].” **Clause 93** *“Where a worker becomes a participant in the catastrophic injuries support scheme under the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*, the employer of the worker: *(a) ceases to be liable for miscellaneous expenses compensation to the extent that the compensation is for expenses incurred or to be incurred after the worker becomes a participant, irrespective of whether or not the worker later ceases to be a participant; and* *is entitled to recover medical and health expenses compensation paid to or on behalf of the worker by the employer prior to the worker becoming a participant from the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund [established under clause 299].”*
Part 2, Division 5: Compensation for miscellaneous expenses over and above caps on medical and health expenses (clauses 82 to 93)	**Schedule 1: compensation entitlements** Under Schedule 1 clause 18A of the current Act, payment of these expenses is generally subject to the	ICA supports Part 2 Division 5 in part, but submits that the increase in the limit on medical and health expenses in clause 79 (applying to ‘special expenses’) should be inclusive of, not additional to, compensation for miscellaneous expenses. Refer ICA’s proposal above regarding clause 79.

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Division 5 creates a new category of miscellaneous expenses. Of note, compensation is payable for reasonable miscellaneous expenses incurred or to be incurred by a worker as a result of the worker's injury, but does **not** form part of the medical and health expenses general limit amount. The Draft Bill provides (clauses 84 to 90) that miscellaneous expenses include: • first aid and emergency transport; • wheelchairs or similar appliances; • surgical appliances or artificial limbs; • repair or replacement of aids, artificial limbs, clothing and the like damaged in a work accident; • travel expenses; and • the cost of permanent impairment assessments.	initial and further increases that may be sought to extend the cap on medical and health expenses (for up to $50,000 and up to a further $250,000, where criteria satisfied).	

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HIV and AIDS: omission of exclusion for disentitling conduct (clause 101) Clause 101, governing the awarding of compensation for an injury resulting from infection of a worker with HIV, does not contain any provision excluding compensation where the infection resulted from the unlawful use of a prohibited drug or from voluntary sexual activity. Refer also clause 424 regarding awarding of damages in respect of contraction of AIDS.	**AIDS, compensation for** (section 31F) Section 31F(6) provides that: "A worker is not entitled to compensation under this Division in respect of an impairment that is AIDS if the impairment resulted from the unlawful use of any prohibited drug or from voluntary sexual activity." Refer also the exclusion in section 93Q to the same effect regarding awarding of common law damages.	ICA submits clauses 101 and 424 should be amended to rectify this omission, consistent with sections 31F(6) and 93Q of the Current Act. ICA sees no reason of policy to justify this omission.
Removal of separate scheme for insuring dust diseases claims arising from mining operations The Draft Bill does not propose a separate policy or insurer for industrial diseases claims arising from employment in a mine or mining operation. Both statutory and common law damages claims will now fall to be indemnified by licensed insurers.	**ICWA the sole insurer for dust disease claims arising from employment in any mine or mining operation** (Sections 151(a)(iii) and Section 163) Currently, section 163 requires certain classes of employers to pay a premium to the Insurance Commission of Western Australia (**ICWA**) which is in turn bound to	ICA's concern is that these additional risks and claims costs (previously the subject of a separate fixed premium and covered by ICWA) will now fall within the coverage provided by its members as licensed insurers. **Proposal**: (1) That WorkCover WA (and the Scheme actuary) include an allowance in premium rates fixed under Part 5, Division 5 of the Draft Bill, factoring in this change; and (2) That ICA and its members be provided with actuarial analysis in relation to the pool and scheme pricing for this purpose.

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	issue a policy to cover claims in respect of pneumoconiosis, mesothelioma, lung cancer and diffuse pleural fibrosis arising from employment in a mine or mining operation. WorkCover is required under section 151(iii)(a) of the Current Act to fix an additional industrial disease premium for this purpose.	
Restrictions on registration of settlement agreements (no facility for settlement of disputed claims for compensation at any time) (clauses 146, 148, 421, 432 and others) Clause 148(1) provides that an application for registration of an agreement to settle a claim for compensation cannot be made until: *(a) A decision has been made that the employer is liable to compensate the worker, either by liability having been accepted (or taken to have been accepted) by*	**Various provisions of Current Act including sections 76, 77, 92, 93K & 301** Sections 76 and 77 of the Current Act are not dissimilar in effect to clauses 146 and 1478 of the Draft Bill. Section 301 is to the same effect for present purposes as Clause 4. While Section 93K is similar in some respects to the proposed clause	ICA strongly opposes the changes to settlement of claims proposed in the Draft Bill. The effect of the proposed Draft Bill is that: • a claim for compensation under the proposed Act cannot be settled with finality (by registration of a settlement agreement commuting liability) unless liability has been accepted or established, **and** at least 6 months have elapsed since the injury date; • where an insurer or self-insurer disputes liability for a worker's claim for compensation, the claim cannot be settled (commuted) in any circumstances;

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the insurer or self-insurer or by liability having been determined by an arbitrator; ***and*** (b) *A period of at least 6 months has elapsed since the date of the worker's injury*. Clause 148(2) does provide that the Regulations may prescribed circumstances in which application for registration of a settlement agreement can be made even if subsection (1) would otherwise preclude this; however, the intended content and form of the Regulations remains entirely unknown to ICA and its members at present. Various other provisions of the Act (refer e.g., cause 146(2)) make it clear that any attempt to settle a claim for compensation, contrary to clause 148, will be invalid (and is indeed prohibited by clause 4). Clause 421(1) provides that Court proceedings for an award of damages in respect of an injury ***must not be commenced*** against the worker's employer unless: (a) the worker's degree of WPI has been assessed to be at least 15%; and (b) the worker has elected to retain the right to seek damages for the injury, with the election duly recorded by the Director.	421(1), the notable difference is that unlike clause 4218(1), which provides that proceedings must not be commenced unless WPI and election prerequisites are satisfied, Section 93K(4) simply provides that damages in respect of an injury **can only be awarded** if these requirements are met. Established case law confirms that section 93K(4) does not preclude a worker from commencing (valid) proceedings seeking an award of damages without satisfying these prerequisites (and the provision simply precludes the awarding of damages by a Court unless and until the requirements are satisfied). The proposed clause 421(1) is therefore quite different in effect. Clause 432 is relatively similar to the current Section 92, save that unlike the current section 92(f)(iii), there is no longer any requirement for the	• under the Current Act, claims for compensation where liability is disputed can nonetheless by resolved with finality by means of the following mechanism; ○ the worker commencing Court proceedings for damages in respect of the injury (as currently, workers do not need to obtain a WPI assessment or register an election before ***commencing*** these proceedings); and ○ the parties entering into an agreement to settle those proceedings, subject to non-disapproval of the settlement agreement by the Director under section 92(f) of the Current Act; • if proposed clauses 421 and 428 are passed in their current form, **this mechanism will no longer be available to resolve disputed claims** (unless the worker has obtained an assessment of at least 15% WPI and has registered an election), as: ○ the worker will be unable to commence valid proceedings for an award of damages (clause 421(1)); ○ arguably, an action for damages cannot be 'successful' (within clause 432) if the

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Clause 421(8) provides that the clause "extends to an award of damages by way of consent judgment or settlement of an action." Clause 432 provides that: *(1) If an action for damages brought by a worker in respect of an injury is successful, the worker must not commence or continue proceedings for or in relation to compensation for the injury.* *(2) For the purposes of this section, an action for damages is successful if:* *(a) the action proceeds to judgment (including the acceptance of an offer to consent to judgment); or* *(b) the action is settled by agreement or acceptance of an offer of compromise.* *(3) If an action for damages is settled by agreement otherwise than by acceptance of an offer to consent to judgment or an offer of compromise, the employer or third party with whom the agreement is made must file a memorandum of the terms of the settlement with the Director in a form approved by the Director within 3 months after the date of execution of the agreement by the worker.*	Director to "not disapprove of" a settlement agreement under clause 432.	proceedings themselves are not valid (particularly having regard to clause 421(8)); and • the combined effect of clause 4 and clause 432(1) is that the worker will therefore be entitled to commence or continue proceedings for or in relation to (statutory) compensation for the injury, regardless of any (purported) settlement agreement; • this will be the case not only in claims where liability is disputed for a (single) injury, but also in circumstances where liability has been accepted for a worker's initial injury, but not any further (disputed) injury or (disputed) secondary condition, which again limits the classes of claims which can be resolved with finality. **ICA strongly submits the Draft Bill introduces far reaching and significant change on this point, and that unless the circumstances to be prescribed under clause 148(3) are sufficiently broad, the outcome of the changes will be undesirable and adverse to the interests of all stakeholders and will be detrimental to the efficient operation and functioning of the scheme.** In support of this position ICA notes that: • both workers **and** employers have an interest in resolving claims where liability is disputed, provided that

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(4) A failure to comply with subsection (3) does not affect the validity of the settlement."		terms can be agreed that are fair and acceptable to both parties; • there will be no available mechanism or facility for the Conciliation and Arbitration Service to resolve claims where liability is in dispute, other than by proceeding to determine liability at Arbitration; • this is clearly contrary to, and will frustrate, the objects of Part 6 of the Act, stated at clause 306 to include: o resolution of disputes in a timely manner; o resolution of disputes in a manner that minimises costs to parties to disputes; and o in the case of conciliation, resolution of disputes in a manner that leads to final and appropriate agreements between parties in relation to disputes; • a significant additional burden will be imposed upon WorkCover's Conciliation & Arbitration Services as a result and be detrimental to the operation and efficiency of the scheme as a whole, as the increased burden will prevent resolution of disputes in a timely manner and will consume disproportionate resources of the scheme; and

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		• significantly increased legal costs are likely to be incurred by parties to disputes, as a result of increased litigated disputes, thereby increasing scheme cost. ICA also submits that given the significance of the issue to the scheme and to stakeholders, it is not appropriate to leave the issue to be addressed in the Regulations at a later date. **ICA therefore proposes amendment of clause 421(1) to overcome this difficulty, and retain the mechanism for settlement of claims for compensation where liability is in dispute in the interests of all Scheme participants, as follows:** • *Damages must not be awarded in respect of an injury against the worker's employer unless:* • *the worker's degree of permanent whole of person impairment resulting from the injury has been assessed to be at least 15% and that assessment has been recorded by the Director as the supporting assessment for the worker's election referred to in paragraph (b); and* • *the worker has elected in accordance with the regulations to retain the right to seek the damages and the director has:*

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		• *registered the election in accordance with the regulations; and* • *notified the worker in writing that the election has been registered.*
Suitable employment (Various clauses) Clause 165 provides that: *(1) In this Act, **suitable employment**, in relation to a worker who has an incapacity for work:* *(a) means employment with any employer performing duties (**suitable duties**) for which the worker is currently suited having regard to the following:* *(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity provided by the worker;* *(ii) the nature of the position in which the worker was employed and the duties*	Various clauses of Current Act (which it is not necessary to recite for the purpose of these submissions)	ICA does not support the definitions of 'suitable employment' and 'suitable duties' in clause 165, and has concerns regarding the impact of the defined terms upon the operation of other provisions of the Act, in a manner ICA and its members consider may be contrary to the intended outcome. ICA's concerns include the following: • The definitions of 'suitable employment' and 'suitable duties' in clause 165 are not clear or simple to understand; • The clause contains inconsistency or ambiguity insofar as the definition of 'suitable duties' is concerned; • Given the interrelationship between the various clauses of the Bill, clause 165(4) as currently drafted is likely to have an adverse impact on the return to work process in removing the ability of employers to provide, and

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undertaken immediately before the worker had an incapacity for work; *(iii) the worker's age, education, skills and work experience;* *(iv) the worker's place of residence;* *(v) any return to work program established for the worker;* *(vi) any workplace rehabilitation services that are being, or have been, provided to or for the worker;* *and* (b) *includes 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).* (2) *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.*		workers to participate in, work hardening activities in the early stages of a return to work program (in providing that suitable duties do not include token duties or duties that do not involve useful work). This is contrary to extensive research confirming the importance of an early return to the workplace and workplace engagement in return to work outcomes, even where the worker's capacity is initially very limited. ICA assumes this is an unintended consequence of the current drafting, which would be detrimental to the intentions and operation of the scheme as a whole; • ICA also suggests replacement of the term 'useful work' with 'meaningful work' as a clearer, more modern term reflective of current research and terminology; • The treatment of the terms 'suitable duties' and 'suitable employment' as interchangeable in some provisions of the Draft Bill is also likely to frustrate the intention and purposes of the Act. ICA submits the Draft Bill would be clearer and the purpose better achieved if the definition of 'suitable employment' were considered in the context of 'return to work' whereas the term 'suitable duties' should be directed to the provision of duties for the purposes of vocational rehabilitation and return to work programs; and

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(3) *For any period during which the worker is engaged in suitable training or vocational re-education provided by, or as approved by, the employer, the worker is taken to be engaged in suitable duties if the worker is paid for that period as if the worker had been working.* (4) *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.* The significance of, and interrelationship between, the use of the terms **suitable employment**, **suitable duties** and **return to work** are evident when one has regard to the following clauses of the Bill: Clause 5 provides that "***Return to work*** *in relation to a worker who has an incapacity for work, means:* *(a) The worker's return to work in the position in which the worker was employed immediately before becoming incapacitated; or* *(b) The worker's return to work in suitable employment."* Clause 49(2) provides that where a worker is partially incapacitated for work, the worker's income compensation		• As a result of use of the term 'suitable employment' in clause 64(2), it is likely (given the beneficial nature of workers' compensation legislation, to be interpreted favourably to the worker in the event of any ambiguity) that employers will now be required to not only prove that a worker in receipt of income compensation payments has obtained new employment, and has verified earnings in that employment, but also that the employment is 'suitable employment' within the meaning of clause 165, and that the new employment the worker has commenced is not only paid employment but constitutes a 'return to work' within the meaning of that term in clause 5, in order to reduce or discontinue the worker's income compensation payments to account for their earnings with the new employer. Clause 64(2) also no longer allows for reduction of income compensation where the worker commences self-employed work. ICA assumes this is not the intention of the Draft Bill (and is not a requirement contained in section 59 of the Current Act) and is simply the result of using terms interchangeably throughout the Act with adverse consequences; **ICA proposal**: to address these issues: **Amend clause 165 to provide as follows:**

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entitlement is to be calculated by deducting "*the amount the worker earns, or is able to earn, in suitable employment*" from the total incapacity income compensation rate. Clause 59 enables a partially incapacitated worker who has been "*unable to obtain suitable employment*" to apply for an arbitrator's order providing that the worker "*is taken to be totally incapacitated for work while the order is effective,*" provide that the worker can establish, amongst other matters, that the failure to obtain suitable employment is wholly or mainly a result of the injury (i.e. an order for deemed total incapacity for work in the language of the Current Act). Clause 64 allows for reduction of income compensation payments in some circumstances, if the worker "*returns to work in suitable employment*" with another employer. Part 3 Division 2 of the Bill (clause 159 on) imposes duties on employers (and, in certain circumstances, hosts of labour hire employers) to establish and implement return to work programs, and upon workers to comply, including but not limited to the following: • Clause 159: establishing a 'return to work program' (defined as a program for assisting an injured worker to *return to work* in a timely, safe and durable way,		*(1) In this Act, **suitable employment**:* *(a) means employment with any employer performing duties for which the worker is currently suited having regard to the following:* *(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity provided by the worker;* *(ii) the nature of the position in which the worker was employed and the duties undertaken immediately before the worker had an incapacity for work;* *(iii) the worker's age, education, skills and work experience;* *(iv) the worker's place of residence;* *(v) any return to work program established for the worker;* *(vi) any workplace rehabilitation services that are being, or have been, provided to or for the worker; and* (b) *includes employment with any employer in a position created or modified particularly to be suitable for the worker having regard to the matters specified in paragraph (a)(i) to (vi).*

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clearly referencing the definition of *return to work* in clause 5 of the Bill) as soon as practicable once appropriate certification is provided by the worker's treating medical practitioner; • Clause 162: an injured worker must make reasonable efforts to return to work, and to participate and cooperate in the establishment and performance of a return to work program.		(2) *Employment with any employer performing duties that, having regard to the nature of the employer's trade or business, are of a merely token nature or do not involve meaningful work, is not suitable employment for the purposes of this Act.* (3) *In this Act,* ***suitable duties*** *includes:* *(a) duties with any employer for which the worker is currently suited having regard to the matters specified in subsection (1)(a)(i) to (vi) above: and* (b) *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; and* (c) *where appropriate, duties that, having regard to the nature of the employer's trade or business, are of a merely token nature or do not involve meaningful work, where those duties are provided for the purposes of increasing duties in stages according to a work hardening program under clause (b), whether for the purposes of work hardening or otherwise.* (4) *For any period during which the worker is engaged in training or vocational re-education provided by, or as*

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		approved by, the employer, the worker is taken to be engaged in suitable duties if the worker is paid for that period as if the worker had been working, provided that the training or employment." **Amend clause 159(1) to provide as follows:** *(1) In this Act-* ***return to work program** means a program for assisting an injured worker to:* ***(a)** commence suitable duties; and* ***(b)** return to work;* *in a timely, safe and durable way."* **Amend clause 64(2) to provide as follows:** *"(2) If the worker commences remunerated work (other than work with the employer liable to pay income compensation), the employer liable to pay income compensation must not reduce or discontinue payment without first verifying the worker's earnings in that remunerated work."* ICA invites and requests further consultation between WorkCover WA and its members before the Draft Bill is further progressed.
Host's obligations to cooperate with labour hire employer	No equivalent in Current Act	ICA supports clause 167 however we suggest the penalty for non-compliance in respect to clause 167(3) be increased.

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(clause 167) Clause 167(3) requires a host to cooperate with a labour hire employer in order to comply with sections 159 and 166 of the Draft Bill, to the extent it is reasonable to do so, to facilitate a worker's return to work. Non-compliance attracts a penalty.		
Prohibition on employer attendance at medical examinations (clause 171) *"A worker's employer, the employer's insurer or an agent of the insurer must not be present at a medical examination of the insurer must not be present at a medical examination of the worker by the worker's treating medical practitioner or another health professional permitted under the regulations to issue a certificate of capacity for the worker."*	No equivalent in current Act	ICA supports clause 171. ICA however requests and invites consultation with WorkCover WA and other stakeholders, with a view to preparing and discussing the best method for distribution of an information sheet or publication to provide education to workers, employers and their agents regarding clause 171, and the distinction between medical examinations falling within clause 171 and return to work case conferences arranged under clause 164, to best ensure compliance with the new clause, **and** the obligation of injured workers to comply with clauses 162 and 164.
Arranging medical examinations and disclosure of medical reports Clause 183 relevantly provides that: • an insurer or self-insurer may require a worker who has claimed compensation to undergo a	Worker may be required to attend medical examination Sections 64, 65 and 70 of the Current Act are in similar terms.	ICA's concern is that there is no equivalent to the current section 70(4) in the Draft Bill. Clause 183 requires a worker to disclose medical reports resulting from examination with a medical practitioner engaged and paid for **by the employer**, but contains a significant

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medical examination with a medical practitioner engaged and paid for by the employer; • the insurer or self-insurer must disclose any resulting report to the worker within 14 days; and • the worker must disclose any resulting report provided to the worker to the insurer/ self-insurer within 14 days.	However, of note, section 70(but also provides that a worker must provide the employer with any report resulting from an examination with a medical practitioner **selected by the worker**, within 14 days.	omission in failing to require a worker to furnish the employer with any report resulting from an examination with a medical practitioner selected by the worker. This is contrary to the established scheme whereby **both** workers and employers are expected to exchange reports of both treating medical practitioners, and practitioners engaged for medicolegal purposes. This lacuna in the Draft Bill is not overcome by the proposed clause 34 (authorisation for collection and disclosure of information) as an employer/ insurer will not hold details of the medical practitioners whom the worker has selected and consulted. **Proposal**: ICA proposes **amendment to clause 183(3)** to provide: *"A worker who is provided with a report as to the worker's medical condition based on:* ***(a)*** *an examination with a medical practitioner that the worker was required to undergo under this section; or* ***(b)*** *an examination with a medical practitioner selected by or on behalf of the worker;* *must give a copy of the report to the insurer or self-insurer within 14 days after the report is provided."*

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Performance monitoring and review of insurers (clause 235) Clause 235 provides that WorkCover WA: • may monitor and review the workers' compensation functions of licensed insurers to determine whether those functions are being carried out effectively, economically and efficiently, in compliance with the Draft Bill, the regulations and any conditions of the insurer's license; and • may inspect financial and other records of a licensed insurer for the purpose of performing these functions.	No equivalent in Current Act.	ICA and its members strongly opposes clause 235 its current form, as being too broad, subjective, and not sufficiently detailed. Proposal: (1) as the records of a licensed insurer relate not only to the licensed insurer's workers compensation functions and business, but to other functions and other lines of insurance, and include records that are highly confidential, legally privileged and commercial in confidence, ICA proposes consultation with licensed insurers to identify suitable classes of documents and records which should/ should not fall within clause 235, before the Draft Bill progresses further; (2) in that regard, the definition of "financial and other" records should be significantly narrowed, and should, amongst other matters, exclude materials related to litigated claims which are before WorkCover's Conciliation and Arbitration Services; (3) further, reference to inspection to ascertain whether functions are being carried out "effectively, economically and efficiently" involves a high degree of subjectivity and criteria for consideration in applying these measures should be clearly defined, preferably in conjunction with ICA and its members.

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Issuing of improvement notices to licensed insurers (clause 236) Clause 236 provides that if WorkCover WA is satisfied that a licensed insurer has contravened a provision of the Draft Bill, the regulations, or a condition of its insurer licence, it may, in addition to or as an alternative to other available actions: • issue an improvement notice to the licensed insurer; and • publish any improvement notice issued to a licensed insurer.	No equivalent in Current Act	ICA and its members strongly oppose clause 236 in its current form, as being too broad and not having sufficiently detailed criteria. ICA proposes consultation with licensed insurers before the Draft Bill progresses further to address key issues such as the following (failing which ICA proposes that clause 236 be withdrawn from the Draft Bill): • as it currently stands, clause 236 does not provide a licensed insurer with any process to respond to an allegation that it has engaged in a contravention, or to know the case it is to meet, before the issue and publication of an improvement notice; • this is contrary to the principles of natural justice, having regard to the significant consequences that may flow from publication of an improvement notice, including but not limited to reputational damage and economic losses to licensed insurers, but also public confidence in the scheme and in licensed insurers; and • criteria should be published and made available to stakeholders outlining what types of contraventions may be subject to the issue and publication of improvement notices, how minor or singular contraventions (as opposed to more significant or repeat contraventions) will

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		be treated, and how parity and impartiality will be maintained across treatment of all licensed insurers. ICA submits that the powers conferred by clause 236 are not dissimilar to those held by the Australian Securities & Investments Commission (ASIC) in respect of Enforceable Undertakings scheme, and refers WorkCover to publications such as *ASIC Regulatory Guide 218: Licensing: Administrative action against persons engaging in credit activities* (issued by ASIC during a transition period in 2010/2011) as a guide regarding the criteria that should be prepared and published to enable affected entities to obtain an understanding of WorkCover WA's powers, and the matters WorkCover WA will generally take into account when exercising those powers, before the Draft Bill is further progressed and before a provision such as clause 236 is enacted.
Adjustable premium policies ('burning cost' policies) (clause 241, refer also clause 240) Clause 241(2) provides that a licensed insurer must not issue an adjustable premium policy to an employer unless, amongst other matters, the policy complies with any requirements prescribed by the Regulations. Clause 241(3) provides that the Regulations may:	No equivalent provision in Current Act	ICA does not support clauses 240 and 241 in their current form, insofar as adjustable premium policies are concerned, without further consultation. A recognised strength of the WA scheme is that it supports innovation, and burning cost policies encourage employers to take ownership and responsibility for their claims outcomes through pricing incentives. Burner agreements primarily specify the process of calculating premium based on claims costs, with a risk/ reward approach embedded in the parameters. Importantly these

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(a) require licensed insurers to provide reports to WorkCover WA in respect of the issue of adjustable premium policies; and (b) modifying the operation of clause 206 in respect of adjustable premium policies. Adjustable premium policies are also indicated to be subject to clause 240, which provides that the Regulations may, amongst other matters: • prescribe any or all of the terms and conditions of a workers compensation policy; and • limit, modify or exclude any term or condition of a workers compensation policy.		agreements do not alter the standard policy coverage or contravene clause 240. Specifically, ICA submits that such policies (insofar as premium calculations, adjustment and financial parameters are concerned) should **not** be subject to clause 240, and that licensed insurers and employers should be free to negotiate the terms of adjustable premium policies without regulatory intervention. In support of its members' position, ICA respectfully submits that: • such policies have a well established and recognised benefit in the WA workers' compensation scheme, in incentivising safety and return to work and allowing for appropriate sharing of risks; • such policies foster competition and innovation; and • the proposed amendments may well (perhaps inadvertently or intentionally) result in loss of these significant benefits. Introduction of the clauses in their current form will have a significant impact on the business activities of licensed insurers **Proposal**: ICA proposes **amendment to clause 241** to insert a new clause 241(3) as follows: "(3) For the avoidance of doubt, section 240 subsection (1) does not permit the issuing of regulations that prescribe, limit, modify or

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		exclude any term or condition of a workers compensation policy insofar as the adjustment of the premium for an adjustable premium policy during the period of insurance under the policy is concerned." Provided this amendment is made, ICA then has no objection to clause 241 as it currently stands.
Funding of compensation for claims arising from acts of terrorism (Clauses 289 to 291) Clauses 289 to 291 of the Draft Bill relevantly provide that: • the *Terrorism Act* is to be abolished; • it will remain the case that workers compensation policies will not insure employers for compensation liabilities in respect of declared acts of terrorism; • clause 293 indicates that the regulations may impose a limit (**claims limit**) on the total amount of compensation liability of all employers in respect of a declared act of terrorism; • WorkCover's Information Sheets indicate the claims limit is likely to be a limit of $100 million per terrorism event;	Currently governed by the *Workers Compensation and Injury Management (Acts of Terrorism) Act* 2001 WA (***Terrorism Act***), passed in response to major reinsurers withdrawing coverage for acts of terrorism post- 11 September 2001 Permits participating licensed insurers (and self-insurers) to exclude liabilities reasonably attributable to an act or acts of terrorism (with compensation still payable by employers) on condition that: • employers' liabilities for such claims will be paid from the *Employers' Indemnity Supplementation Fund* (administered by ICWA);	ICA's concern is that: • as flagged in WorkCover's Information Sheets (and consistent with ICA's submission on point to WorkCover WA dated 31 July 2014), licensed insurers may experience difficulty securing reinsurance from reputable AAA rated reinsurers for this type of risk over the current $25 million cap; • however, in light of clauses 289 to 291, the concerns of ICA's members remain, and specifically, ICA remains concerned as to the proposed method of funding the proposed increase to a cap of $100 million via the DIF. **Proposal**: ICA proposes that: (1) the DIF meet claims in respect of a declared act of terrorism up to the **current** cap of $25 million per terrorist event; (2) the Draft Bill be amended to provide that WorkCover WA is to secure reinsurance cover on behalf of all Scheme

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• however, the *Employers' Indemnity Supplementation Fund* will no longer respond; • employers' claims for compensation liabilities in respect of a declared act of terrorism will now be met by the Default Insurance Fund (**DIF**) established by the Draft Bill; • rather than funding terrorism claims via a levy on employers, DIF payments will be met via a levy on licensed insurers and self-insurers.	• a $25 million collective liability cap applies per terrorist event (section 8(3) of *Terrorism Act*); and • if called to do so, participating insurers will contribute to the cost of satisfying any claims made upon the *Employers' Indemnity Supplementation Fund.*	participants (i.e. licensed insurers, self-insurers, and ICWA/ RiskCover) for the remaining $75 million exposure, per terrorist event, up to the proposed new claims limit of $100 million, with the premiums for reinsurance cover to be recovered (proportionally, with provisions to address how to proceed in the event of insolvency of a self-insurer or other stakeholder) from licensed insurers and self-insurers via contribution to the DIF. ICA requests and invites further consultation regarding these provisions between its members, ICWA/ RiskCover, self-insurers and RiskCover before further progression of the Draft Bill.
Definition of 'acts of terrorism' Clause 289 provides that: *(1) In this Division-* *act of terrorism means a dangerous action or threat of a dangerous action, if the dangerous action is done or the threat is made with the intention of advancing a political, religious or ideological cause and with the intention of:* *(a) coercing, or influencing by intimidation, the government of a State, the Commonwealth or*	The *Workers Compensation and Injury Management (Acts of Terrorism) Act* 2001 WA **(*Terrorism Act*)** simply provides at section 9 that employer's liabilities to a worker "attributable to an act of terrorism" in the relevant period may be claimed from ICWA as a claim under the Employers' Indemnity Supplementation Fund.	While ICA welcomes the certainty provided by section 290 and the provisions for the Minister to declare an action or threat to be an act of terrorism for the purposes of the legislation, ICA and its members have concerns that the definition of 'act of terrorism' in clause 289 is narrower in its terms than the definition in the (current) standard employers' indemnity policy. Of note: • the current Policy excludes a licensed insurer's liability to indemnify an employer for compensation or damages for injury resulting from the use or threat of force/ violence for or in connection with political, religious, ideological, ethnic

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a foreign country or of part of a State or a foreign country; or *(b) intimidating the public or a section of the public.* *(2) A dangerous action is an action that has 1 or more of the following results (each result a dangerous result):* *(a) causes serious harm that is physical harm to a person;* *(b) causes serious damage to property;* *(c) causes a person's death;* *(d) endangers a person's life, other than the life of the person taking the action;* *(e) creates a serious risk to the health or safety of the public or a section of the public.* (3) *Advocacy, protest, dissent or industrial action is not a dangerous action if it is not intended to have any dangerous result.* Clause 290 provides that the Minister may declare an action or threat to be an act of terrorism for the purposes of the Draft Bill.	The current standard employers' indemnity policy issued by licensed insurers in Western Australia provides (at exclusion 1(a)) for exclusion of claims "directly or indirectly occasioned by… Acts of Terrorism". The term 'Acts of Terrorism' is defined at clause 6 of the policy to mean any act in the relevant time period "*including but not limited to the use of force or violence and/or threat thereof, of any person or group(s) of persons whether acting alone or on behalf of or in connection with any organisation(s) or government(s), which from its nature or context is done for, or in connection with, political, religious, ideological, ethnic or similar purposes or reasons including the intention to influence any government and/or to put the public, or any section of the public, in fear;*"	or similar purposes **including** the intention to influence the government or put a section of the public in fear; • clause 289(1) is significantly narrower, providing that **only** acts or threats intended to influence or intimidate a government or a section of the public will constitute acts of terrorism; • moreover, the act or threat must now cause serious physical harm, serious property damage or create a serious risk to the health or safety of a section of the public (whereas there are no such restrictions under the current scheme); • clause 289(2)(a), in providing that a dangerous action must (unless subclauses (b) to (d) apply) cause serious **physical** harm to a person, excludes a very significant class of claims from the application of Part 5 Division 9 (namely, claims for psychological or psychiatric disorder resulting from a dangerous action or the threat of a dangerous action). ICA's members are surprised by this exclusion, as one would expect claims for psychological or psychiatric disorder to be easily foreseeable in these circumstances,

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		and considers such claims should not be excluded from the definition in clause 289(1); • ICA submits that claims arising out of or in connection with biological, chemical, nuclear or radioactive pollution or contamination should similarly fall under Part 5 Division 9 of the Draft Bill (administered by the DIF and excluded from workers compensation policy coverage under clause 291); • ICA requires WorkCover to clarify the definition of 'Loss Occurrence' by specifying the duration and extent of any one Loss Occurrence (i.e. how many consecutive hours would one Loss Occurrence be defined as). This definition also needs to be aligned with the reinsurance definition and coverage provided, to avoid any gaps; and • Cyber-attacks are evolving as a new terrorism risk and the ICA would welcome discussions with WorkCover to have this emerging risk included in definition of 'act of terrorism' in clause 289;and ICA proposes further consultation with a view to discussing suitable amendments to the proposed clauses. Also of concern to ICA is that clause 291 only excludes licensed insurers' liability to indemnify employers for compensation

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		liabilities resulting from acts of terrorism, where there has been a declaration by the Minister of an act of terrorism under clause 290. To avoid any inference that declarations under clause 290 might be politically motivated, ICA suggests amendment of the Draft Bill to provide a mechanism for stakeholders to obtain an independent declaration in a court of competent jurisdiction as to whether an 'act of terrorism' as defined in clause 289 has occurred. ICA requests and invites further consideration with WorkCover WA and other stakeholders regarding these provisions before the Draft Bill is further progressed.
Licensed insurers' contributions to DI Fund (Part 5 Division 5, clauses 259 to 267) Clause 259 provides for establishment of the *WorkCover WA Default Insurance Fund* (**DI Fund**), to be under the direction, control and management of WorkCover WA. Clause 264 provides that for each financial year, WorkCover WA must determine the amount (if any) required to be paid into the DI Fund, and must then (as per subclauses (2) to (7)) calculate the contribution to be	No equivalent in Current Act	ICA and its members propose and request that: • the process for calculation of the contributions to be paid by licensed insurers to the DI Fund be transparent and open; • in the interests of transparency and parity, all actuarial data be disclosed to licensed insurers; • WorkCover WA provides confirmation that all contributions by licensed insurers and self-insurers to the DI Fund will be factored into the actuarial calculations for

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required from licensed insurers and self-insurers to yield the total annual required DI Fund contribution. Clause 266 allows WorkCover WA to require additional DI Fund contribution/s for a financial year to meet the cost of unexpected claims.		the financial year(s) in question, and published in the annual Actuarial Assessment of Premium Rates; and • the Draft Bill be amended to include a mechanism for calculation and payment of insurer contributions on an annual levy percentage basis (refer the former Supplementation Fund Levy) with inclusion of a cap on the percentage of total premium income that a licensed insurer can be required to contribute to the DI Fund and CIF (combined) in any financial year. ICA requests and invites further consideration with WorkCover WA and other relevant stakeholders regarding these provisions before the Draft Bill is further progressed.
Licensed insurers' contributions to CIF (Part 5 Division 11, clauses 299 to 303) Clause 300 provides that for each financial year, the Insurance Commission of Western Australia (**ICWA**) must determine, and must notify WorkCover WA of, the amount to be credited to the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund* (**CIF**). Clause 301 requires WorkCover WA to calculate the CIF contributions required from licensed insurers and self-insurers to yield the total annual required CIF contribution.	No equivalent in Current Act	ICA and its members propose and request that: • the process for calculation of the contributions to be paid by licensed insurers to the CIF be transparent and open; • in the interests of transparency and parity, all actuarial data be disclosed to licensed insurers by both ICWA and WorkCover WA; • WorkCover WA and ICWA provide confirmation that all contributions by licensed insurers and self-insurers to the CIF will be factored into the actuarial calculations for the financial year(s) in question;

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Clause 301(2) provides that clauses 264(2) to (7), which govern calculation of DI Fund contributions, apply to the calculation of CIF contributions. Clause 302(4) provides that WorkCover WA must remit CIF contributions to ICWA in accordance with arrangements agreed to between WorkCover WA and ICWA. Clause 303 allows for WorkCover WA to require additional CIF contribution/s for a financial year upon advice from ICWA to meet the cost of unexpected claims.		• the Draft Bill be amended to include a mechanism for calculation and payment of insurer contributions on an annual levy percentage basis (refer the former Supplementation Fund Levy) with inclusion of a cap on the percentage of total premium income that a licensed insurer can be required to contribute to the DI Fund and CIF (combined) in any financial year; • ICWA provides confirmation, and the Draft Bill be amended to clarify, that the cost of catastrophic claims arising from motor vehicle accidents (currently falling under the *Motor Vehicle (Catastrophic Injuries) Act* 2016 WA) will be excluded from any calculation of CIF contributions, and that the costs of CIF claims will be kept separate and distinct from such costs. ICA requests and invites further consideration with WorkCover WA, ICWA and other relevant stakeholders regarding these provisions before the Draft Bill is further progressed.
Requirement that worker obtain assessment of at least 15% WPI before registering common law election (Clauses 421 and 422)	**Sections 93K and 93L of Current Act** Section 93L permits a worker to elect to retain the right to seek damages where:	The proposed Clause 421 does not allow an employer and worker to reach agreement that a worker has satisfied the 15% or 25% WPI threshold, and instead requires workers to obtain an assessment for election purposes, **even if** the parties otherwise agree. ICA does not support this change.

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Clause 421(1) provides that Court proceedings for an award of damages in respect of an injury must not be commenced against the worker's employer unless: (a) the worker's degree of WPI has been assessed to be at least 15%; and (b) the worker has elected to retain the right to seek damages for the injury, with the election duly recorded by the Director. Clause 421 also provides that a worker must elect, and the Director must register the election, in accordance with the Regulations (yet to be published).	• the worker and employer **agree** that the worker's degree of WPI is at least 15%, or at least 25%, as the case may be; **or** • in the absence of agreement, the worker has obtained an assessment of his degree of WPI.	ICA and its members consider this change will lead to unnecessary increases in scheme costs, namely, the cost of unnecessary assessments of a worker's WPI in cases where it is clear, and the parties agree, that the worker satisfies (or will, once their condition stabilises sufficiently, satisfy) the requisite WPI levels. **Proposal**: ICA proposes **amendment of clause 421** consistent with the former section 93L on this point. ICA and its members would be pleased to consult further with WorkCover WA to discuss a proposed amended clause if requested to do so.
Clause 505/ General: No equivalent to Section 79 of Current Act combined with inclusion of clause 505 Clause 505 provides that: *(1) A person must not disclose information about a worker's claim for compensation to another person for the purpose of providing information to that person about the worker's suitability for employment with a prospective employer.* *Penalty for this subsection: a fine of $10,000*	**Section 79: Wilful and false representation by worker** *"Where it is proved that the worker has, at the time of seeking or entering employment in respect of which he claims compensation for an injury, wilfully and falsely represented himself as not having previously suffered from the injury an arbitrator may in the arbitrator's discretion*	The proposed clause 505, combined with the absence of any equivalent to Section 79 of the Current Act: • removes any onus or obligation a worker has to be forthcoming in disclosing any pre-existing conditions or prior claims to a prospective employer; • may in fact (depending upon the breadth of the definition given to 'person') actively prevent a worker from disclosing a pre-existing condition or prior claim to a prospective employer, even where that pre-existing condition or prior claim is relevant to the worker's ability to

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(2) *Subsection (1) does not apply if the information is disclosed in relation to a return to work program or for the purpose of providing information about the worker in relation to suitable employment for the worker.* (3) *A person cannot, for the purpose of selection for employment, be required to disclose information about any claim for compensation by the person.*	*refuse to award compensation which otherwise would be payable."* (The Current Act contains no equivalent to the proposed clause 505 of the Draft Bill.)	perform the role, or (in the case of a disability) the worker's need for reasonable modifications or adjustments to enable the worker to safely perform the role; • would likely also (given the apparent breadth of the definition of 'person') preclude a treating medical practitioner, or a practitioner examining the worker for the purposes of e.g. a pre-employment medical examination from passing on to a prospective employer any information a worker has freely provided to the practitioner that is relevant to the worker's ability to safely perform the role in question; • will in fact inhibit an employer's ability to discharge the employer's duty of care, to ensure workers can safely perform roles for which they are engaged or to make any reasonable modifications or adjustments to enable this to occur; and • would likely (again, depending upon the breadth of the definition of 'person') even prevent a vocational rehabilitation provider from disclosing suitable information to businesses who may be in a position to engage a worker for the purposes of an external work trial, with a view to rehabilitating the worker into an alternative role post injury with a new employer.

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		Anti-discrimination laws already prevent employers from utilising any health information provided to them (by workers, medical practitioners or others) in a discriminatory manner. ICA respectfully submits that clause 505 will have the (presumably unintended) effect of preventing employers from gathering relevant health information to assess employees' needs and to make suitable adjustments to roles (to ensure safe workplaces) in the case of injury or disability, and will also frustrate one of the objects of the Draft Bill (namely, assisting to vocationally rehabilitate injured workers who cannot return to their pre-injury roles). **Proposal**: ICA strongly proposes amendment of the proposed clause 505 to suitably limit its breadth so as not to limit an employer's ability to meet the duty of care it owes to its employees, **and** inclusion of a suitably worded equivalent to Section 79 of the Act to afford some protection to employers where a worker fails to disclose a **relevant** pre-existing condition or prior claim. ICA and its members respectfully request the opportunity to consult further with WorkCover WA to discuss suitably worded clauses.
General: increased penalties for non-compliance with the Draft Bill		ICA and its members would welcome consultation regarding the intent behind the increased penalties, and the circumstances in

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		which WorkCover WA intends to apply penalties (in that regard we refer again to our comments in reference to clause 236 regarding ASIC's approach to and publication of the criteria it applies in determining how to exercise its powers; ICA strongly submits that a similar approach by WorkCover WA would be best practice and would benefit the scheme overall, in the interests of transparency and parity). ICA also submits that the penalties imposed for breach of some provisions appear unnecessary and overly onerous. By way of example only, imposing a penalty for failure by an insurer or self-insurer with the time limits imposed by clauses 29(5) and 30(2) of the Draft Bill would appear to be both unnecessary and unduly penal, as the consequences flowing from failure to comply (noting that in both cases, the insurer or self-insurer is taken by means of the breach to have accepted liability for the claim, with a corresponding obligation to pay compensation for an accepted claim) already provide a strong incentive to comply. ICA requests consultation with WorkCover WA regarding these issues generally before the Draft Bill progresses further.
General: operation of, and management of claims falling within, catastrophic injuries support scheme		ICA invites and requests consultation with licensed insurers regarding the manner in which the catastrophic injuries support scheme, and CIF generally, is intended to operate; the intended

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		procedures for management of claims where some aspects fall under the workers compensation scheme and Act, and other aspects are managed under the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016;* expectations and intended protocols surrounding information sharing between workers compensation insurers and ICWA in regard to claims for catastrophic injury; and intentions and consequences if an injured worker's participation in the catastrophic injury support scheme ends yet the worker has remaining entitlements under the workers compensation scheme. In addition to the above, we see risks with the current draft whereby it is not easily read or understood; if lifetime care costs are intended to be excluded from common law claims; or how the operation of the CISS would impact claim reserving and thus premium calculations at different points within the claim lifecycle. Consultation and clarity would be welcomed before the Draft Bill progresses further.
General: No equivalent provision to Sections 73 and 74 of the Current Act allowing for apportionment of liability to pay compensation between employer(s) and insurer(s) where the injured worker's condition can be linked to work with more than one employer, or work with an employer over the risk periods of more than one insurer.	**Worker entitled but dispute between employers (section 73).** **Worker entitled but dispute between insurers (section 74)**. Section 73 provides as follows:	ICA strongly objects to the removal of sections 73 and 74 or any equivalent, noting there is no equivalent clause in the Draft Bill (other than those governing claims in respect of NIHL or certain prescribed industrial diseases, which make up a very small proportion of claims as a whole).

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The Draft Bill does contain discrete provisions allowing for apportionment in the case of certain prescribed industrial diseases and in the case of claims for compensation for noise induced hearing loss (**NIHL**) as set out below. However, the Draft Bill is otherwise **silent** on this issue. Clause 36 of the Draft Bill (**Claiming compensation for certain diseases when more than one employer liable**) provides that: '*1. In this section -* ***disease compensation** means compensation payable for injury by disease that is -* *(a) a prescribed disease under section 10 taken to be from certain employment under that section; or* *(b) a dust disease;* ***relevant employer** means an employer who employs a worker in relevant employment;* ***relevant employment** means employment in respect of which there is a liability for disease compensation.*	*(1) Where there is a dispute between employers as to liability but no dispute that the worker is entitled to compensation from some employer for a fresh injury or the recurrence of an old injury the employer of the worker at the time of the latest injury or recurrence is liable to pay compensation under this Act until the question of which employer is liable or how liability is to be apportioned between employers has been resolved.* *(2) The worker or his dependents, if so required by the employer first liable to pay compensation, shall furnish to him the name and address of any employer in whose employment the worker was when any like injury previously occurred, as he or they may possess.* *(3) If the worker has filed an application for compensation, the respondent employer shall join as*	ICA submits this will leave licensed insurers with no mechanism for apportionment of liability in matters where the injured worker's condition can be linked to work with more than one employer, or work with an employer over the risk periods of more than one insurer. ICA submits that replacement provisions are required. Further submissions on this point are provided below (* at page 55). **ICA proposal:** for the inclusion in the Draft Bill of provisions equivalent to sections 73 & 74 of the Current Act, drafted so as to also overcome the shortcomings of the current provisions (see discussion below). ICA is prepared to draft suggested provisions to be circulated for stakeholder consultation if that would assist.

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2. *Disease compensation may be claimed from the employer who last employed the worker in relevant employment (the **last employer**) even if there is a question as to which of two or more relevant employers is liable to compensate the worker or how that liability is to be apportioned between two or more relevant employers.* 3. *The last employer is liable to deal with the claim and make payments of compensation as if the last employer were wholly liable and the last employer's insurer at the time compensation is paid must indemnify the last employer for any such payment.* 4. *If there are two or more relevant employers in respect of a claim for disease compensation, each relevant employer is liable to make to the last employer such contributions as, in default of agreement, may be determined by an arbitrator.* 5. *In a proceeding for the determination of a dispute as to the liability for contribution by relevant employers, an arbitrator may make an order requiring the payment of*	*a party any other employer whom he alleges is wholly or partially liable to pay the compensation.* *(4) If the worker has not filed an application the employer first liable to pay compensation may apply for a determination by an arbitrator of the question of whether some other employer is wholly or partially liable to pay compensation.* *(5) If an arbitrator finds that it was a recurrence and not a fresh injury or partly a recurrence and partly a fresh injury, the arbitrator may order that other employer to pay to the applicant employer the whole or a part of the amount of compensation paid to the worker and to pay any further compensation to which the worker is entitled.* *(6) If the dispute between employers is in respect of liability to pay*	

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compensation by any relevant employer or for the apportionment of liability for compensation between relevant employers. *6. A worker who makes a claim for disease compensation must provide to the last employer such information as the last employer may reasonably request for the purpose of identifying any relevant employment in which the worker was employed before employment with the last employer.*' Clause 109 (**Apportionment of NIHL compensation between employers**) provides that: '*1. If noise induced hearing loss suffered by a worker is due to employment with more than one employer, liability for noise induced hearing loss compensation must be apportioned in accordance with the regulations between those employers.* *2. An arbitrator may determine a dispute about the apportionment between employers of liability for noise induced hearing loss.*'	*compensation for noise induced hearing loss under section 24A or 31E, WorkCover WA shall provide an arbitrator dealing with the dispute with copies of the results of any relevant audiometric tests stored by WorkCover WA under clause 5(2) of Schedule 7.* Section 74 of the Current Act provides as follows: *(1) Where a worker is entitled to compensation for a fresh injury or the recurrence of an old injury from an employer but there is a dispute between insurers as to liability to indemnify that employer, the insurer of the employer of the worker at the time of the latest injury or recurrence is liable to indemnify the employer until an arbitrator has otherwise determined.* *(1A) An employer or insurer may apply for a determination by an*	

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	arbitrator of a dispute between insurers notwithstanding any term or condition of any policy of insurance providing for some other means of settling disputes. *(2) An arbitrator shall determine which insurer is liable or how liability is to be apportioned and may make such order as the arbitrator thinks proper for the reimbursement of one insurer by another and for the indemnity of the employer in respect of his liability under the Act.*	

*** Further ICA submissions in support of the need for provisions in the Draft Bill equivalent to Sections 73 & 74 of the Current Act**:

ICA's licensed insurer members frequently refer to Sections 73 & 74 of the Current Act and the case law that has developed around the provisions in resolving disputes informally between themselves (and in the absence of equivalent provisions, licensed insurers will have no mechanism to do so).

Similar provisions in other jurisdictions

ICA submits that workers' compensation legislation in other jurisdictions contains apportionment provisions, and respectfully submits that it would be remiss of WorkCover WA not to include such provisions.

For example, section 126A of the *Return to Work Act 1986 (NT)* provides as follows:

> ***Liability as between approved insurers***

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1. *Subject to subsection (2), where an employer is liable under this Act to pay compensation to a worker, the approved insurer of the employer at the time the claim is made shall indemnify the employer for the full amount of the employer's liability to the worker notwithstanding that the approved insurer may allege that, at the time the injury was sustained or the disease was caused, the liability to indemnify the employer (whether in whole or in part) was that of another approved insurer.*
2. *Where an approved insurer who has indemnified an employer for the employer's liability to pay compensation to a worker under this Act is aware that another approved insurer may be liable to indemnify the employer for all or a part of the compensation paid, the first mentioned insurer:*
   (a) shall notify the other insurer as practicable after becoming aware of the insurer's potential liability; and
   (b) may, within six months after becoming aware of the other insurer's potential liability or such longer period as the Court may allow:
      (i) commence proceedings in the Court to recover from the other insurer all or a part of the compensation paid; or
      (ii) where other proceedings in respect of the claim for compensation have been commenced, join the other insurer as a party to those proceedings.
3. *Where an approved insurer has indemnified an employer for the employer's liability to pay compensation to a worker under this Act and it is subsequently established that another approved insurer was liable to indemnify that employer in whole or in part, that other insurer shall reimburse the first mentioned insurer such amount or amounts:*
   (a) as agreed between the two insurers; or
   (b) in the absence of such agreement, as the Court determines.
4. *In this section, approved insurer includes:*
   (a) a self-insurer; and
   (b) the Territory.'

By way of further example, sections 97A & 97B of the *Workers Rehabilitation and Compensation Act 1988 (TAS*) provide that:

97A: Disputes between insurers, &c

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'Section 97A

1. *If a dispute arises as to which of two or more insurers is liable to indemnify an employer in respect of a claim for compensation, any one of the insurers, the worker or the employer may refer the dispute to the tribunal.*
2. *Where a worker is entitled to compensation for an injury from an employer but there is a dispute between insurers as to liability to indemnify that employer, the insurer of the employer of the worker at the time of the latest injury is liable to indemnify the employer until the tribunal has otherwise determined.*
3. *The tribunal is to determine which insurer is liable to indemnify the employer or how liability is to be apportioned and may make such order as it thinks proper for the reimbursement of one insurer by another and for the indemnity of the employer in respect of the employer's liability under this Act.*
4. *An employer or insurer may refer a dispute between insurers for conciliation … notwithstanding any term or condition of any policy of insurance providing for some other means of settling disputes.*

97B: Worker entitled during dispute between employers

1. *Where there is a dispute between employers as to liability but no dispute that a worker is entitled to compensation from some employer for an injury, the employer of the worker at the time of the latest injury is liable to pay compensation under this Act until the question of which employer is liable or how liability is to be apportioned between employers has been resolved.*
2. *The worker or his or her dependents, if so required by the employer first liable to pay compensation, is to furnish to the employer the name and address of any employer in whose employment the worker was when any similar injury previously occurred.*
3. *If the worker has filed an application for compensation, the respondent employer is to join as a party any other employer who the respondent employer alleges is wholly or partially liable to pay the compensation.*
4. *If the worker has not filed an application for compensation, the employer first liable to pay compensation may refer for conciliation … the question of whether some other employer is wholly or partially liable to pay compensation.*

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5. *If the tribunal finds that the liability to pay compensation arose as a result of one or more injuries, it may order another employer to pay to the employer first liable to pay compensation the whole or a part of the amount of any compensation paid to the worker and to pay any further compensation to which the worker is entitled.*'

Operation of scheme if no equivalent apportionment provisions

If the Draft Bill were passed without the inclusion of an equivalent to sections 73 & 74 of the Current Act, ICA submits the outcome would be detrimental to the interests of injured workers and the scheme as a whole.

Shortcomings in the mechanism of apportionment under the Current Act

The ICA's members do consider there are shortcomings arising from the current scheme and that, while sections 73 & 74 of the Current Act are preferable to a complete absence of apportionment provisions, the consultation process surrounding the Draft Bill provides an ideal opportunity to draft equivalent yet improved provisions which address these shortcomings.

ICA Proposal

ICA therefore proposes the inclusion in the Draft Bill of provisions equivalent to sections 73 & 74 of the Current Act, drafted so as to also overcome the shortcomings of the current provisions.

ICA is prepared to draft suggested provisions to be circulated for stakeholder consultation if that would assist.