Insurance Commission
of Western Australia

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Mr Chris White
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Dear Chris

WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2021

Thank you for the opportunity to comment on the draft Workers Compensation and Injury Management Bill 2021 (draft Bill). I apologise for the delay in providing this information.

As the insurer responsible for managing the cover for most WA public sector agencies, the Insurance Commission supports initiatives that enable workers to recover and return to their workplace as soon as is safe do so, while enabling claims to be resolved expeditiously where that outcome is not possible.

The draft Bill captures the drafting instructions developed by the Insurance Commission in 2020 and the related engagement with WorkCover WA. Those instructions primarily focused on two key areas:

1. Amendment of the *Motor Vehicle (Catastrophic Injuries) Act 2016* to enable catastrophically injured workers who have a compensable workers compensation claim to access lifetime treatment, care and support under the Insurance Commission's Catastrophic Injuries Support Scheme.
2. Removal of the requirement for the Insurance Commission to issue insurance policies to mining employers to cover them against claims for compensation by workers for industrial diseases. The commercial insurance market has the capacity to issue those policies and covers all other Australian jurisdictions for this risk.

We set out below some matters of interest for the Insurance Commission in the draft Bill along with suggestions as to how those matters might be addressed.

Settlement pathways

The draft Bill proposes that an application to register a settlement can only be made where the insurer has accepted liability (or an arbitrator has made a determination on that liability) and a period of at least six months has elapsed since the date of the injury.

In all other circumstances – described as 'exceptional cases' in the information sheets – either a small number of novel rules apply to enable settlement or – as would be expected in the majority of these circumstances – a conciliator will need to issue a Certificate of Outcome.

The Insurance Commission does not support the introduction of compulsory conciliation for settlements made between willing and competent parties. If 'conciliation' is the act of mediating between two disputing parties in an attempt to resolve their differences, it is unclear what benefit is achieved by compelling two parties to attend conciliation when there may be no material issues in dispute.

While the stated intent of these changes is to simplify settlements by introducing a 'single pathway', this will impose unnecessary process, cost and complexity to the resolution of a large cohort of claims that are currently settled effectively without those imposts.

Based on the application of the proposed settlement changes in the Bill to our claims experience in prior years, the Insurance Commission estimates that there would be an 18-fold increase in the number of claims that would require conciliation services.

The Insurance Commission suggests that such an outcome would be unwelcome for claimants, WorkCover and insurers.

The large volume of additional conciliation efforts estimated under the proposed changes is likely to blow out the duration of claims by unnecessarily delaying the resolution of claims. The wait for access to conciliation services based on current demand generated under the existing legislation is already eight weeks. In the absence of significant additional resources for conciliation services that may not be warranted, these changes would cause further gridlock within the workers compensation system. The introduction of a quasi-judicial process to claimants that may be seeking a settlement to move on with life should also not be under-estimated as a source of stress for that claimant.

To scale up the provision of conciliation services to meet that additional workload (even if only to maintain the current long waitlist of eight weeks for a conciliation), is likely to be very costly.

As these services are funded from within the workers compensation system, those additional costs will ultimately be borne by Western Australian employers. No estimation of those costs have been provided in the consultation materials.

In addition, employers would also have to pay increased premiums associated with the direct impact of those changes. The Insurance Commission estimates that its legal expenses and claims management costs will increase by more than $700,000 in the first year alone.

These additional costs can expect to be dwarfed by the additional compensation payments made during longer waits for conciliation services. This will also 'run down' the potential settlement outcome for a worker that is not likely to return to work with the existing employer.

The Insurance Commission recommends this costly change that can be expected to diminish the operation of the workers' compensation scheme be removed from the draft Bill.

We note that the two election commitments – the change to the compensation payment step down and increases to the medical and health expenses compensation – are expected to increase premiums by as much as 3.03 per cent. These cost increases would be layered on top of significant recent growth in workers compensation claims and claims costs that are already apparent in the current system.

In line with these trends, in July 2021, the Insurance Commission increased the expected cost of paying workers compensation to government employees over the forward estimates by $279 million. As of November 2021, the estimate of this additional cost is $363 million. Workers compensation costs for the WA government agencies covered by RiskCover have historically been at an aggregate of around $200 million per annum. This past cost is expected to double by the end of the forward estimates, and that is without the potential unintended costs associated with certain provisions in the draft Bill.

Ministers and officials have expressed concerns about escalating workers compensation costs and have asked the Insurance Commission to identify means to reduce the rate of workers compensation cost increases. Those requests have been made before information about the cost increases identified above was available.

As an insurer operating within a highly regulated workers compensation system, the ability of our organisation to address these rising costs is limited.

As identified in this letter, some of the proposed reforms will accelerate cost growth and further diminish our ability to manage the cost of workers compensation to the WA Government.

Genuine liability dispute

Section 60 currently allows dispute of accepted liability to pay compensation where new information arises about the mechanism of injury.

The proposed repeal of s 60 takes away the insurer's ability to dispute liability, advance a worker's return to work, or change the income compensation payment arrangement.

For example, if a worker sustains an injury and starts to receive workers compensation payments, there would be no mechanism to dispute the claim if a subsequent doctor's report concludes that the injury could not have been sustained in the workplace.

The Insurance Commission recommends amending the draft Bill to include the ability for the employer to progress claims in these circumstances, and allow a review of a liability decision that was previously approved where new information is identified.

Reasonable administrative action for psychological injuries

As you know, mental stress claims remain enormously overrepresented in the WA Government. Despite the public sector representing only 8.5% of the State's workforce, its workers lodged 51% of the total mental stress claims in WA during 2020. Mental stress claims have increased 16% since 2015-16.

These mental stress claim statistics are more concerning as first responders to traumatic accidents such as police and ambulance officers are (currently) not covered by the broader State Government workers' compensation arrangements.

Any change to bring these workers into the broader Government workers compensation scheme can be expected to significantly increase the cost of workers compensation to the State.

The definition of an administrative action makes it unclear whether 'dismissal' is included and whether 'disciplinary action' covers efforts to improve performance or correct an employee's behaviour and the termination of employment.

It may be worthwhile to include a definition of 'disciplinary action' within the context of the new framework, similar to the definition under s 80A of the *Public Sector Management Act 1994* as it includes dismissal.

We recommend that the new phrase 'whether formal or informal' be applied to all administrative actions listed in the provision.

The Insurance Commission is aware of stress claims when employers address employee performance issues, such as implementing performance improvement plans or requiring them to work standard hours. As these do trigger workers compensation claims in the current regime, the definition could prudently be enhanced to capture these reasonable management and administrative actions.

Industrial diseases research

Clause 621 of the draft Bill makes consequential amendments to the *Insurance Commission of Western Australia Act 1986* (ICWA Act) to reflect that the Insurance Commission is to no longer issue industrial disease insurance policies.

Further consequential amendments should be made to s 6(e) of the ICWA Act to delete references to "industrial diseases" in (i) and (ii) as there should be no reference for the Insurance Commission to initiate, participate in or promote programs related to industrial diseases if the Insurance Commission does not issue insurance policies to cover that exposure.

Claims relating to acts of terrorism

Under clause 238(5) of the draft Bill, the Insurance Commission is considered a licensed insurer that is not required to contribute to the Default Insurance Fund. The draft Bill does not however make clear that the Insurance Commission, or the agencies that it insures, will not have access to the Default Insurance Fund for claims related to declared acts of terrorism.

It is recommended that clause 238(5) is amended to clarify that the Insurance Commission, or the agencies it insures, cannot make claims against the Default Insurance Fund.

False and misleading statements offence

Clause 524 makes it an offence for a person to make false or misleading statements. However, the drafting of section 524(1) significantly limits the scope of the offence to only be in, or in connection with, an application, notice or document given under the Act.

False statements, which frequently relate to a person's physical or mental capacity, made during the course of a claim will not be captured as a result of this limitation.

It is recommended that clause 524 be amended to make it an offence to make false or misleading statements to WorkCover or an insurer in relation to a claim for workers compensation. This approach also mirrors the approach taken in section 534 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld).

Regulations and approved forms

The draft Bill relies on subsidiary legislation to set out how various arrangements are intended to work. As the Insurance Commission has not been given a copy of the draft regulations or approved forms, it is unable to comment on them at this stage.

We welcome the opportunity to comment on the draft regulations and proposed forms when they are available.

If you have any questions about our submission, please contact me, or [redacted]

Sincerely

ROD WHITHEAR
CHIEF EXECUTIVE