

WorkCover WA Review *Workers' Compensation and Injury Management Act 1981* **FINAL REPORT**

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Introduction

WorkCoverWA has undertaken a consultation process to review the *Workers' Compensation and Injury Management Act 1981*.

The Law Society of Western Australia made a comprehensive submission in January 2014 to the second stage of the consultation process.

This submission is made by the Society in response to the Final Report of the WorkCoverWA *Review of the Workers' Compensation and Injury Management Act 1981* dated June 2014.

WorkCover WA has advised that the government will release an exposure draft of any new bill for public comment before it is introduced to Parliament.

The Society looks forward to the opportunity of reviewing the draft bill.

Part 1 - Preliminary

Definition of worker

- R:6** *It is recommended the definition of 'worker' in the new statute be based on the definition of an 'employee' for the purpose of assessment for PAYG withholding under the Taxation Administration Act 1953 (Cth).*
- R:7** *It is recommended the new statute authorise the making of regulations to include or exclude from the definition of worker particular arrangements under which a person works for another in prescribed work or work of a prescribed class.*
- R:8** *It is recommended provisions relating to casual workers, police, personal representatives and dependants of deceased workers be structured as separate subsections within the definition of worker.*

The report emphasises the need for clarity and certainty – in particular, the certainty of knowing whether or not a person must be covered for workers' compensation at the commencement of a contractual arrangement.

The Society considers that the Report does not correctly state the consequences of moving to *"the definition of an "employee"* for the purposes of the tax Acts. There is in fact no definition of "employee" in the tax Acts; the tax law relies on employees and employers applying the same common law tests as are currently used to determine whether someone is a 'worker' within the primary definition.

Taxpayers and withholders wanting "guidance" must consult taxation ruling TR2005/16 which summarises the various indicators for an employee.

This ruling supersedes ruling TR2000/14 as a result of *"recent case law developments"*. The tax law, as interpreted with the assistance of these rulings, simply provides that employees at common law are covered and that contractors are not covered.

The effect of the proposed amendment would be exactly the same if the primary definition was left intact in the current Act and the extended definition removed. Accordingly, the recommendation provides no benefits other than removing from the definition of "worker", a large number of people who are currently covered.

In particular, any uncertainties with the current definition would remain with the recommended definition. The fact that an employer has decided that a particular person is not an employee for the purposes of PAYG is not conclusive. The worker can proceed to the Directorate and there prove that he should have been treated as a PAYG employee.

What then will be the consequences for the employer once the Directorate finds that the employer has been in breach of its PAYG obligations?

Table 2 is misleading. The simple position is that under the PAYG proposal, no contractor will be covered, whereas under the current extended definition, some contractors are covered. The net effect of the proposal is therefore to remove some workers from the compensation system.

R:7 seems to be based on the belief that anomalies can be cured by quickly making new regulations. It is the Society's view that it will be better for the statute to be fully considered by Parliament.

As to R:8, the Society has no objection.

Particular classes of workers

Work for private householders

R:9 *It is recommended regulations provide a person is not a 'worker' within the meaning of the new statute while the person is engaged in domestic service in a private home unless:*

i) the person is employed by an employer who is not the owner or occupier of the private home; and

ii) the employer provides the owner or occupier with the services of the person.

R:10 *It is recommended the domestic worker exclusion not apply if the person is engaged to provide care or assistance to a person in prescribed circumstances.*

The Society has supported R:9, subject to the position of strata companies being considered (which it does not seem that it has been). The Society believes that any exclusion should be precisely set out in the statute rather than in the regulations.

The Society perceives the main problem with domestic services for private householders as being that there is sometimes doubt as to whether a worker who, for example, comes to clean every Friday, is truly a casual or a permanent part-timer. A strata company could well be in the same situation, although it is more likely to be a permanent part-time situation.

It is the Society's view that the position of strata companies would best be dealt with by a provision that a domestic worker employed by a strata company is excluded only if the services provided are for less than eight hours per week.

R:10 is supported but it is submitted that the “*prescribed circumstances*” ought to be clearly stated in the statute rather than added later by regulations.

Religious workers

R:13 *It is recommended provisions regarding ‘religious workers’ be consolidated in the new statute without reference to any particular faith.*

R:14 *It is recommended religious workers who do not otherwise meet the definition of ‘worker’ may be deemed a worker via a declaration process.*

The Society supports R:13 and, in principle, it supports R:14. However, the Society reserves its comments on any declaration process that might be formulated.

Psychological injuries – reasonable administrative action

R:18 *It is recommended the definition of ‘injury’ exclude psychological injuries (diseases) arising from ‘reasonable administrative action’ taken by an employer in respect of a worker’s employment.*

The Society notes that this issue was not in the discussion paper and is now being raised for the first time.

The Society has concerns about the breadth of the expression, “*reasonable administrative action*”. Presumably a teacher who was unjustly accused of child abuse and had to endure an understandable (ie. “*reasonable*”) enquiry into his behaviour before being declared innocent, would find that any psychological consequences were not compensable.

The Society considers the nature of this amendment needs to be examined more closely before it proceeds. There should be specific reference to what constitutes “administrative actions.” If it is intended that it relate to “performance management” then this should be stated.

Repealed provisions

It is stated in the final report as it was in the discussion paper that no persons are working as ‘tributers’ and that the modified procedure set out in s16 is no longer needed. The Society has no contrary information but at the same time, cannot verify those assertions. Its support for the repeal is therefore conditional.

Part 2 - Compensation

Compensation generally

R:20 *It is recommended the new statute define the following key terms:*

- i) prescribed amount;*
- ii) compensation;*
- iii) medical expenses;*
- iv) other expenses.*

R:21 *It is recommended the annual indexation methodology for the prescribed amount be located in regulations.*

R20: The Society supports this proposal and looks forward to reviewing the legislative language of the definitions when formulated.

R21: The Society submits that the methodology should be contained in the Act and not in the Regulations.

Claim process

R:23 *It is recommended the new statute establish a consistent claim process, applicable to both insurers and self insurers.*

The Society supports this proposal and further submits that the process should include the giving of a written claim.

Consistent claim process

R:25 *It is recommended regulations prescribe the process for making a claim.*

The Society submits that the “*process for making a claim*” is a critical aspect of compensation legislation and likely to attract a high level of disputation. Accordingly, such an important process should be prescribed in the principal Act. Including it in the principal Act will enable appropriate parliamentary scrutiny. The “*process for making a claim*” should not be a mere regulation. The various prescribed forms may be in the regulations but the process should be in the Act.

Pended claims

R:26 *It is recommended the new statute establish a process for pended claims in accordance with the following: i) payment of weekly earnings and medical expenses commence within 14 days after notice is given that an insurer is unable to make a decision on liability within the required timeframe; ii) payment of medical expenses of up to \$5,000 inclusive of amounts paid prior to commencement of provisional payments; iii) all payments are without prejudice; iv) an insurer be permitted to require a worker to attend at a doctor of the insurer's choice within a month of issue of a First Certificate of Capacity.*

The Society supports this proposal which should be contained in the Act.

Consent authority

R:28 *It is recommended the new statute introduce a mandatory requirement for a worker to provide authority for the collection and release of personal information substantially in the terms of the two authorities already found in the claim form.*

R:29 *It is recommended a worker's consent authority be made irrevocable for the life of the claim.*

R:28 The Society submits the concept of "personal information" must be defined before further comment can be made. Further, there must be clarity on the consequence(s) of not completing the "mandatory requirement".

R:29 The Society's comments in its January 2014 submission have not been addressed. Further submissions can only be offered when R28 is clarified as submitted above.

Compensation entitlements

Weekly payments

R:30 *It is recommended all workers' weekly payments be calculated on the basis of their pre-injury earnings over a 12 month period.*

R:31 *It is recommended the minimum earnings of workers whose earnings are prescribed by an industrial award be the rate of weekly earnings under the award, exclusive of any over award or service payments, overtime, bonus or allowance.*

R:30 The Society supports R:30 and further submits that the calculation should be the number of weeks worked in the 12 month period before the injury in the one employment for the one employer ie. it should not be calculated against the average for pre-injury earnings over a 12 month period but rather an average of pre-injury earnings on the weeks employed over the last 12 months in the employment in which he or she was injured.

R:31 The Society opposes R:31 on the basis that it will produce a distinction between award and non-award workers. Requiring the subtraction of over-award payments, overtime etc., adds to the clerical complexity that these amendments are supposed to be reducing.

Common law impairment assessment expenses

R:35 *It is recommended the entitlement for expenses associated with a worker's first common law impairment assessment include the cost of referrals to medical practitioners, specialists or allied health providers in order to complete the assessment.*

The Society supports this proposal but submits that these additional expenses should not come out of the medical expenses prescribed amount.

Varying compensation through the Conciliation and Arbitration Services

R:75 *It is recommended the new statute introduce a single provision enabling a worker, employer or insurer to apply to the Conciliation and Arbitration Services to vary (discontinue, suspend, reduce or increase) a worker's entitlement to weekly payments.*

The Society supports this proposal but submits that careful consideration must be given to the language of the proposed new section. The Society notes that sections 60, 61 and 62 have been carefully considered by Courts and Tribunals over the last 3 decades. These sections are the subject of well settled law. Before fusing these sections, Parliament should be convinced that there are compelling policy reasons for changing the current scheme.

Remuneration from another employer

R:76 *It is recommended where a worker fails to provide details of remunerated work with another employer upon request, weekly payments may be suspended (without an order of an arbitrator) until the details are provided.*

The Society's view is that there should be a requirement for notice of the suspension.

Suspension of weekly payments when in custody

R:79 *It is recommended the new statute provide, where a worker is in custody or serving a term of imprisonment, entitlements may be suspended by an employer without the order of an arbitrator.*

The Society submits that a WorkCover Arbitrator should determine status of the worker before payments are interfered with. The Society notes that ambiguity may follow the terms "in custody" which may not follow the terms "serving a term of imprisonment".

Settlements

R:82 *It is recommended statutory settlements be available: i) if a period of 6 months has elapsed after the claim was first accepted or determined; or ii) if a period of 6 months has not elapsed, or the claim has not been accepted or determined, if the claim meets the 'special circumstances' criteria prescribed in regulations.*

The Society submits that "special circumstances" would need to be defined before it can make further comment.

Part 3 – Injury Management

Return to work programs

R:90 *It is recommended the new statute expressly provide a worker must participate in a return to work program (including its establishment) if the employer is required to establish a program.*

The Law Society supports the intent of this change. However, clarity will be required in respect of what acts or things are involved in "establishment" of an RTW program.

Injury management case conferences

R:91 *It is recommended a worker be required to attend an injury management case conference if requested by the employer or insurer for the purpose of: i) establishing or amending a return to work program; ii) discussing suitable duties and reaching a shared understanding of workplace issues, barriers and return to work opportunities; iii) clarifying any issues or actions identified in a medical certificate or return to work program.*

R:92 *It is recommended an injury management case conference must be attended by the worker, the worker's treating medical practitioner, and either the employer or the insurer or both.*

R:93 *It is recommended an injury management case conference must not be utilised for the purpose of obtaining a medical examination or medical report or to determine questions of liability.*

R:94 *It is recommended if a worker refuses or fails to attend an injury management case conference without reasonable excuse, an order may be sought in the Conciliation and Arbitration Services to suspend the worker's weekly payments.*

Subject to what is provided by regulations and that appropriate safeguards are in place to ensure the process is not misused, this change is supported.

Part 4 – Medical assessment

Regulation of Approved Medical Specialists

R:109 *It is recommended the new statute authorise WorkCover WA to establish a regulatory framework for Approved Medical Specialists.*

R:110 *It is recommended Approved Medical Specialists be approved for a 3 year period.*

R:111 *It is recommended the WorkCover WA CEO be empowered to require an Approved Medical Specialist to produce impairment assessments for inspection and review on request.*

R:112 *It is recommended the new statute include an express power for WorkCover WA to place conditions on the approval of an Approved Medical Specialist, and suspend or revoke an approval for non-compliance with conditions.*

R:113 *It is recommended the new statute replace the term 'Approved Medical Specialist' with 'Approved Permanent Impairment Assessor (APIA)'.*

The Society supports this change, subject to the legislative wording and to the regulatory framework being reasonable and transparent.

Part 5 – Liability and Insurance

Audit of remuneration declarations

R:119 *It is recommended the new statute provide in prescribed circumstances audit costs incurred by WorkCover WA or an insurer be recoverable from an employer.*

The Society supports R:119 provided the prescribed circumstances are limited to deliberate or wilful under-declaration by employers.

Remuneration declarations – record keeping

R:120 *It is recommended the new statute require employers to make and maintain correct records of remuneration of all 'workers' employed by the employer and the employer's industry class on the basis of which an insurer charged premium.*

R:121 *It is recommended the new statute require records of employment be retained for 7 years from the date the record was first created.*

The Society supports R:120 and R:121 in principle but reserves comment until the legislative form of the proposal is made available for comment.

Obligation on principal to pay compensation where employer uninsured

R:123 *It is recommended the new statute require a principal contractor to be made a party to proceedings if WorkCover WA is made aware the principal contractor may have a liability under the Act.*

R:124 *It is recommended the new statute require a principal contractor to pay compensation due to a worker of an uninsured employer (with whom the principal is jointly and severally liable), irrespective of whether an award is made against the direct employer only.*

R:123 It is the Society's view that the requirement that a principal contractor be made a party to proceedings would add cost and complexity to proceedings.

R:124 The Society reserves further comment until the legislative form of the proposal is made available.

Contractual Indemnities

R:125 *It is recommended the new statute prohibit workers' compensation policies or endorsements covering contractual indemnities in respect of an insured employer's undertaking to indemnify a third party in respect of the third party's liability to pay damages.*

R:126 *It is recommended the prohibition on policy endorsements not apply to a principal extending the statutory indemnity permitted under the current Act to include liability to pay damages to a contractor's workers.*

The Society is likely to support these proposals but reserves comment until the legislative form of the proposals is made available.

Part 7 – Common Law

Election to retain the right to seek damages

R:165 *It is recommended a worker's whole person impairment must be certified by an Approved Medical Specialist in order for the Director to record the degree of impairment for the purpose of electing to pursue common law damages.*

The effect of this recommendation is to remove the ability of the parties to agree to an impairment level for common law.

In cases where satisfaction of the impairment threshold is obvious and undisputed, the implementation of this recommendation will:

- (a) require an attendance by a worker with an Approved Medical Specialist for the purpose of obtaining an assessment of WPI and thus result in the incurring of unnecessary expense; and
- (b) give rise to delays in the progress or settlement of a claim.

Neither of these outcomes is desirable. The Society does not support R:165.

Commencement of proceedings

R:166 *It is recommended the new statute require the common law threshold and procedural requirements be met in relation to an injury prior to the commencement of proceedings for damages.*

In its submission dated 28 January 2014, the Society noted, at page 46, a potential disadvantage to workers where a limitation of action timeframe could pass before an election can be registered (for example, if maximal medical improvement has not been reached).

In such a case, the worker will lose the right to pursue a claim for damages, even if ultimately left with a WPI of 15% or greater.

In the Final Report, WorkCover WA stated, at paragraph 928:

"It is highly unlikely workers or their legal representatives would not have arranged a WPI assessment before the 3 year limitation period expires and should be aware that certain procedural requirements need to be met before commencing an action in the Court."

Whilst this may be the case, the risk nevertheless exists for a worker to lose the right to pursue a claim for damages if prohibited from commencing proceedings prior to satisfying the common law threshold and procedural requirements. There can be no justifiable basis for such a risk to exist.

Further, the ability for proceedings for damages to be commenced prior to the common law threshold and procedural requirements being met has in many cases enabled claims to be resolved quickly and without the incurring of unnecessary costs. To remove the ability to resolve claims quickly and cost-effectively by introducing a provision in accordance with R:166, is not in the interests of workers, employers or insurers.

The Society does not support this recommendation.



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