Insurance Commission
of Western Australia

Date: 7 February 2014

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Mr Kevin Gillingham
WorkCover WA
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Dear Mr Gillingham

REVIEW OF THE WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981 - DISCUSSION PAPER

I am writing in response to WorkCover WA's discussion paper outlining proposals to redraft the *Workers' Compensation and Injury Management Act 1981,* and inviting submissions from stakeholders.

A team of senior managers and workers' compensation claims practitioners within the RiskCover Division reviewed your discussion paper and proposed the response attached.

The Insurance Commission endorses the following proposals without comment; 1-5, 7, 12-14, 16, 18-20, 22, 24, 30, 32 & 33, 36, 38-40, 43-62, 72-78, 80, 82-86, 89, 94-96, 98 & 99, 101-103, 105-109, 110, 113-116, 118-129, 134-137, 140-142, 147, 157-160, 166, 173-175, 179 and 181 & 182. It has no comment to make about the proposals numbered; 10, 131-133, 138 & 139, 149-156, 162 & 163 and 170.

We have attached a schedule containing the Insurance Commission's comments on the remaining proposals. The schedule also includes comments concerning two additional matters which the Insurance Commission proposes WorkCover consider for inclusion when redrafting the Act.

The Insurance Commission's contact if you wish to discuss elements of this submission is Don Williams, General Manager RiskCover, ☎ 9264 3400 or email: don.williams@icwa.wa.gov.au.

Yours sincerely

ROD WHITHEAR
CHIEF EXECUTIVE

REVIEW OF THE WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981 - DISCUSSION PAPER

PROPOSALS SPECIFICALLY COMMENTED ON BY ICWA

Definition of Worker

P:6 – It is proposed the definition of 'worker' in the new statute be based on the 'results test' to distinguish between workers and independent contractors.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:8 – It is proposed provisions relating to casuals, police, personal representatives and dependants of deceased workers be structured as separate subsections within the definition of 'worker'.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Work for private householders

P:9 – It is proposed 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.

ICWA endorses this proposal. However, for purposes of clarity, there may be a need to develop and insert a definition or general description of "domestic services" to include for example, nannies, carers, gardeners, home maintenance (plumbers, carpenters, electricians) and personal trainers.

Religious workers

P:11 – It is proposed provisions regarding 'religious workers' be consolidated in the new statute.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Overseas workers

P:15 – It is proposed the new statute include a provision to deal with overseas workers based on an express period of cover for 24 months.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Definition of 'compensation'

P: 17 – It is proposed the new statute introduce a broad definition of 'compensation' encompassing all entitlements.

ICWA supports this proposal subject to the definition of 'compensation' being clear and unambiguous and adhering to the principles of plain language as set out in paragraphs 64-68 of the Discussion Paper.

Medical certificates

P:21 – It is proposed the new statute introduce a head of power for regulations to prescribe classes of persons, other than medical practitioners, who may issue workers' compensation certificates in prescribed circumstances.

Recognising the current pressure on general practitioner services, both in the Perth metropolitan area and in regional areas, as well as the need for injured workers to receive medical attention in a timely manner, ICWA endorses this proposal in principle. There must, however, be strict requirements around; who can issue certificates and in what circumstances they can be issued. Significant concerns exist about the potential for over-servicing by some allied health providers. Over-servicing is not in line with evidence based treatment standards set by allied health industry bodies. At present there is very little insurers and self-insured employers can do to have over-servicing addressed within the current workers' compensation scheme, so we would not wish to see a greater potential for this to occur.

Where an injured worker requires regular minor treatments following an initial medical appointment, it might be appropriate for a nurse practitioner to provide this treatment and issue progress/final medical certificates. It is ICWA's view that the first medical certificate must always be issued by a medical practitioner unless the injured worker is in a remote area with no timely access to a doctor.

Consent authority

P:23 – It is proposed a consent authority be mandatory, irrevocable and extend to all relevant medical and other information sources.

ICWA strongly endorses this proposal. It agrees that for a claim to be accepted, a mandatory, irrevocable consent is required.

Claim process

P:25 – It is proposed the new statute introduce a head of power for regulations to prescribe the process for making a claim.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill and would appreciate some sense of what would be proposed to be introduced in the regulations.

Pended claims

P:26 – It is proposed the timeframe and notification requirements related to decisions on liability by insurers be prescribed in regulations.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:27 – It is proposed the new statute discontinue the Director's oversight role of claims where a decision on liability is not made within the prescribed time.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:28 – It is proposed where an insurer is not able to make a decision within the prescribed timeframe the insurer must issue a prescribed notice. The insurer must reissue the notice every 14 days until a decision on liability is made

ICWA opposes the proposed amendment on the basis that it is bureaucratic, adds more process and paperwork for little gain and leaves room for debate in cases where letters might be sent 15 days apart, difficult to administer, and does not add any value to the claims management process. The current provisions in s57A & s57B are adequate. Workers have the right to have their disputed claims determined quickly and efficiently by the conciliation process provided their claims have merit.

Most applications for conciliation are heard within four weeks and Conciliation Officers have the power to make Payment directions under s182K(2) or (4). Therefore the proposed amendments seem contentious, and an unnecessary burden on the insurer/self-insurer.

Since commencing its review of the proposals contained in the discussion paper, ICWA has become aware of WorkCover's alternative to Proposal 28. That is, where no decision is made on liability within the prescibed timeframe (i.e. pended claims), compensation payments are to commence without this being construed as an admission of liability. Additionally, where a decision on liability is not made within 90 days, liability will be deemed accepted.

ICWA strongly opposes the alternative proposal. It is ICWA's practice to only pend claims where there is insufficient information upon which to make a decision within the s57B timeframe. Under the current legislative requirements, ICWA is required to, and does, provide reasons to workers as to why a decision cannot be made, so the worker is aware of the position of their claim. Collection of the information sought is followed up regularly.

ICWA, through government agencies covered in the RiskCover Fund, has a greater representation of stress claims than other insurers/self-insurers participating in the WA workers' compensation scheme. These claims require factual investigations, legal opinions and psychiatric reviews, all of which can and do take time, especially due to the difficulty in obtaining prompt medical appointments, and requested reports.

Some government agencies offer injury management to the worker, on a Without Prejudice basis whilst this information is being collected, to help maintain connection with the worker.

Despite WorkCover's statistics about the number of pended claims which are eventually disputed, many stress claims are resolved by s92f Deeds. Often this is the best outcome for all parties, and recognises the "greyness" of some matters.

Automatic payment of up to 90 days weekly compensation, without any mechanism to recover that in the event a matter is successfully disputed, will add to claims costs borne by government agencies. The increasing cost of workers' compensation within the WA Government over recent years is a matter of significant concern to the departments and agencies we serve, we do not want to increase costs more than necessary.

It is considered the automatic payment of up to 90 days weekly compensation, without any mechanism to recover that in the event a matter is successfully disputed, will encourage some workers to lodge claims, knowing they will receive some payment regardless of the merits of their claim. In addition, this measure is likely to result in insurers declining claims instead of pending them to avoid the automatic payments, with consequent flow-on adverse impact on the Conciliation & Arbitration Service.

Minor claims

P:29 – It is proposed the new statute introduce a minor claim pathway allowing for payments of up to $750 (indexed annually) by insurers to workers without an admission of liability.

ICWA will work with WorkCover to develop this proposal further in an endeavour to avoid some of the consequences that have been encountered in other jurisdictions.

Definition of 'prescribed amount'

P:31 – It is proposed the new statute:

i) locate the definition of the prescribed amount in the Compensation Part;

ii) introduce a head of power for regulations to prescribe the annual indexation method;

iii) make clear the prescribed amount is exclusive of GST.

ICWA endorses this proposal subject to seeing and being comfortable with the indexation methodology adopted for annual movement in the prescribed amount.

Definition of 'other expenses'

P:34 – It is proposed the new statute define 'other expenses' to include current worker entitlements that do not form part of the maximum entitlement for medical expenses.

ICWA endorses this proposal subject to the application of an appropriate prescribed cap/limit.

First aid and emergency expenses

P:35 – It is proposed the new statute introduce an entitlement to reasonable expenses associated with ambulance or other service used to transport a worker to hospital or other place for medical treatment (which will not form part of the maximum entitlement for medical expenses).

ICWA endorses this proposal subject to the application of an appropriate prescribed cap/limit.

Calculation of weekly payments

P:37 – It is proposed the new statute simplify the method of calculating weekly payments by basing the calculation for all workers on pre-injury earnings.

ICWA understands that great care will need to be taken in the drafting of these provisions (as there have been attempts previously to achieve clarity and fairness) and are willing to participate in a working group to assist in designing a legislative framework to achieve a fair outcome for all participants.

ICWA commends WorkCover on this initiative and hopes a legislative framework can be put in place to achieve these objectives in a fair manner.

Compensation for permanent impairment

P:41 – It is proposed the new statute provide lump sum compensation for permanent impairment is an independent entitlement and may be obtained without entering into a settlement.

P:42 – It is proposed the new statute provide receipt of lump sum compensation for permanent impairment does not impact a worker's entitlement to ongoing compensation or constrain the right to pursue and receive common law damages (unless it forms part of a settlement).

ICWA does not endorse the proposal that lump sum compensation for permanent impairments become an independent entitlement without entering into a settlement.

The concept of providing lump sum settlements for permanent impairments has historically and primarily been catered for by inclusion in a Schedule 1 Redemption which redeems the employer's liability or a standalone Schedule 2 lump sum settlement which does not redeem the liability but does bring about an end to weekly payments and medical expenses. It would seem an assessment of permanent impairment to enable lump sum compensation is predicated and rightfully so, on the assumption of maximum medical improvement and stabilisation of the injury, and theoretically with minimal or no requirement for ongoing treatment.

Under the current statute, if a worker elects to take a Schedule 2 lump sum settlement based on a permanent impairment assessment and at some time later the impairment was assessed at a far higher percentage, the worker is entitled to receive the extra amount (subject to medical evidence that the further deterioration was directly related to the original injury).

The proposal that lump sum compensation for permanent impairments could become an independent entitlement without entering into a settlement, and with such payment having no impact on a worker's ongoing compensation nor constraining the right to pursue and receive damages (unless the payment forms part of a settlement), does not appear to take into account the concept of maximal medical improvement and stabilisation of the injury being achieved before such an assessment / payment is made. If ongoing treatment is required, then this may result in a future improvement in the worker's level of impairment, and it is preferable that maximum recovery and stabilisation be reached before such permanent impairments are assessed and compensated. This then begs the question as to what avenues are available to an employer / insurer if following further treatment a subsequent impairment assessment is lower than the one that enabled the payment.

A secondary consideration in leaving permanent impairments linked to settlements is the positive impact on active claim numbers. It stands to reason that employers and insurers want to keep their active claim numbers at a minimum and it is highly likely the proposal to allow permanent impairments being an independent entitlement would lead to an increase in active claims.

Death and funeral entitlements

P:63 – It is proposed the new statute introduce a new framework for death and funeral entitlements.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Definition of 'dependent' etc

P:64 – It is proposed the definition of the terms 'dependant', 'member of the family', 'spouse' and 'defacto partner' be consolidated in the new statute and located within the subdivision dealing with death entitlements.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Lump sum death benefit

P:65 – It is proposed the new statute introduce a new maximum 'lump sum death benefit' for family members totally dependent on the worker's earnings.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Lump sum death benefit

P:66 – It is proposed the lump sum death benefit be increased from $283,418 to 2.5 times the prescribed amount (currently $516,855).

ICWA endorses an increase in the lump sum death benefit, but considers a lesser increase than proposed would be more appropriate.

Lump sum death benefit

P:67 – It is proposed no deduction is to be made from the lump sum death benefit for prior workers' compensation payments to the deceased worker.

ICWA does not endorse this proposal.

Lump sum apportionment

P:68 – It is proposed the new statute set out, in table form, the family members eligible for the lump sum death benefit and their proportionate share.

ICWA endorses this proposal but reserves its final comment until it sees how this proposal is drafted in the amending Bill. Debate about whether such a statutory provision should replace provisions in a person's Will may be needed.

P:69 – It is proposed totally dependent children be entitled to a share of the lump sum death benefit in addition to the prescribed children's allowance.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:70 – It is proposed the lump sum payment for a partial dependent be an amount proportionate to the loss of financial support suffered. The lump sum payment is not to exceed the maximum amount for total dependency (or the prescribed maximum for a dependent spouse, defacto partner or child).

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

P:71 – It is proposed the new statute no longer provide for a minimum amount payable as a death benefit to dependents.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Medical examinations

P:79 – It is proposed the new statute consolidate provisions relating to employer initiated medical examinations.

ICWA endorses this proposal. In the case of insurer referrals, ICWA would like there to be provisions setting out the consequences for failure to attend without reasons.

General power to vary compensation

P:81 – It is proposed the new statute clearly outline the specific circumstances in which an employer can vary (discontinue, suspend or reduce) a worker's entitlement.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Definition of 'medical practitioner'

P:87 – It is proposed the new statute define 'medical practitioner' to include persons who are:

i) registered by the Australian Health Practitioner Regulation Agency;

ii) appropriately qualified and registered outside the Commonwealth as a medical doctor.

ICWA endorses this proposal. However, we would like to see that the services of medical doctors who are only registered outside of the Commonwealth are only used or approved when the injured worker is living or receiving treatment outside of Australia.

Entitlements of workers in custody

P:88 – It is proposed 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.

ICWA endorses this proposal, provided there is not automatic reentitlement without appropriate medical certification and there is a valid claim for ongoing entitlements.

Safety net arrangements where employer uninsured

P:90 – It is proposed 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 (in accordance with current s175).

ICWA endorses this proposal, but on the basis that, in any orders issued, it is clearly stated who is the payer.

P:91 – It is proposed 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.

ICWA does not endorse this proposal.

Statutory settlement pathways

P:92 – It is proposed the new statute introduce a new settlement regime consisting of a:

i) primary pathway;

ii) secondary pathway available in special circumstances

P:93 – It is proposed a settlement finalises a worker's statutory claim for compensation and ends a worker's right to pursue and receive common law damages.

ICWA approaches proposals 92 and 93 with some trepidation. Aspects of these proposals are supported i.e., "a settlement finalises a worker's statutory claim for compensation and ends a worker's right to pursue and receive common law damages". However, there are aspects which cause concern - i.e. "primary pathway and secondary pathway in "special circumstances" ..."

ICWA acknowledges in the narrative about "special circumstances" on page 113, some examples are given as to what constitute "special circumstances", however, the list is stated to not be exhaustive and therefore there is uncertainty around what in the end will qualify as "special circumstances".

There is also uncertainty about the test to be applied to determine if the proposed settlement is "in the workers best interests".

If 92f Deed settlements are removed from the WCIMA and the scheme, then we urge the introduction of a corresponding method of settlement - perhaps the re-introduction of the unfettered redemptions that were in use until the 1990s. ICWA believes there must be a statutory mechanism to allow informed parties the right to settle a claim and bring about finality and certainty both in relation to WCIMA entitlements and at common law, in a cost effective and timely manner.

In some respects the current 92f Deed settlements occupy a high degree of expense and time - there is the cost of a District Court Writ, the cost and time occupied in the drafting, engrossing and execution of the related documents and then the processing of these at WorkCover seeking approval of the settlement.

If a framework could be introduced to process settlement documentation at WorkCover rather than the courts by simple cost free documentation this would deliver a clear cost saving to scheme participants, quicker settlements and proper recording as to whether the settlement is solely WCIMA entitlements or for both WCIMA and common law.

As with proposal 37, ICWA understands that great care will need to be taken in the drafting of these provisions and we are more than willing to participate in a working group to assist in designing a legislative framework to achieve a fair outcome for all participants.

ICWA supports WorkCover's comments as to legal advice for workers.

Code of Practice (Injury Management)

P:97 – It is proposed the key requirements outlined in the *Code of Practice (injury management)* be included in the operative provisions of the new statute, as appropriate.

ICWA endorses this proposal. However, ICWA reserves its final comment until it sees how this proposal is drafted in the amending Bill.

Issuing of medical certificates and work capacity

P:100 – It is proposed medical certificates (certificates of capacity) must:

i) certify the injured worker's incapacity for work;

ii) state whether the worker has a current work capacity or has no current work capacity during the period stated in the certificate;

iii) specify the expected duration of the worker's incapacity.

ICWA endorses this proposal. RiskCover has experienced situations where workers have not obtained regular medical certificates which has hampered return to work outcomes. ICWA strongly supports the requirement for workers to provide initial and progress medical certificates in order to receive entitlements.

Pre-injury position and suitable duties

P:104 – It is proposed the new statute clarify, where a worker attains partial or total capacity for work, the employer is to provide the worker with their pre-injury position.

ICWA supports this in principle but for many employers it will be difficult to provide the worker with part of their job and still operate effectively, i.e. Prison Officers with partial capacity may not be able to safely return to prison officer duties if they cannot run or restrain prisoners.

Some flexibility is needed for both the employee and employer. A statute can be a blunt instrument in this space where for sound reasons, one or other of the parties may not see a return to the pre-injury position as a good or even viable outcome.

Injury management case conferences

P:111 – It is proposed 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.

ICWA supports the concept of injury management, case conferences and recognises the benefits which can be achieved. However, ICWA is concerned about legislation forcing any party to attend such a conference. Forcing parties to come together is usually unproductive. The intent of this proposal needs further consideration and development.

P:112 – It is proposed 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.

Whilst ICWA accepts that case conferences usually occur after liability is determined, it does not endorse this proposal because there may be circumstances where discussion involving questions of liability at case conferences may be appropriate and necessary for either or both parties.

Specialised retraining programs

P:117 – It is proposed the specialised retraining program regime be discontinued.

ICWA endorses this proposal as it understands this program has not been accessed at any time.

Exclusion of war

P:130 – It is proposed workers' compensation insurance policies be required to indemnify claims arising out of war and other hostilities.

ICWA points out that it is likely that insurers will not be able to secure reinsurance protection for this type of event. This proposal may appear to be one that has Government asking insurers to cover risk which then winds up being risk borne by Government. WorkCover will need to consider how it will provide protection for approved insurers and self-insurers, particularly for a catastrophic war or hostilities related event.

In paragraph 588, mention is made of the standard policy of insurance imposed on insurers, and underpinned by regulations. It goes on to state that employers are not required to insure for an aggregate amount of damages (common law) exceeding $50 million. The standard policy, at clause 9, refers to an agreed amount of cover that is not less than $50 million. This appears to be inconsistent.

The minimum amount of cover at $50 million was established following discussions with the insurance industry, including ICWA, in about 1994. This amount is overdue for consideration for possible increase commensurate with increases in CPI or some other relevant index.

Licensing of insurers

P:143 – It is proposed the new statute introduce the term 'licensed insurer' to replace the term 'approved insurer'.

ICWA prefers to retain the term 'approved insurer' rather than 'licenced insurer'. This term is more functional, particularly in view of Proposal 165 where it is proposed to deem ICWA to be an 'approved insurer'. ICWA will not be seeking a 'licence' to perform its functions.

P:144 – It is proposed the new statute empower WorkCover WA to license insurers.

ICWA does not endorse this proposal. See comments on Proposal 143. ICWA operates WA self-insurance arrangements including workers' compensation. ICWA does not seek approval for licencing for property or liability insurance for that reason. Workers' compensation is no different.

Conditions on licensed insurers

P:145 – It is proposed the new statute empower WorkCover WA to impose conditions on licensed insurers.

ICWA does not endorse this proposal in accordance with its comments for Proposal 143.

Insurer performance monitoring

P:146 – It is proposed the new statute provide WorkCover WA with express authority to monitor whether an insurer complies with licence approval criteria and conditions.

ICWA does not have any substantive comment on this proposal, as it is deemed an insurer under s44 of the ICWA Act, and will not therefore be subject to such unknown 'licence approval criteria'..

Approved insurer – requirement to quote

P:148 – It is proposed the new statute oblige insurers to provide a quote on the premium likely to be charged, if requested by an employer.

ICWA endorses this proposal. However, mindful of Proposal 165 to deem ICWA to be an approved 'insurer' and s44 of the ICWA Act, the principles outlined in paragraph 694 should not be undermined by this proposal.

Cancellation of policies

P:161 – It is proposed the new statute enable WorkCover WA to permit an insurer to cancel a policy of insurance for nonpayment of premium where:

i) the insurer has given reasonable notice to the employer about the amount due;

ii) the premium has remained unpaid for a prescribed period.

ICWA endorses this proposal. However, more detail is required about the extent of time for the prescribed period. Remedies will be important to canvass.

Insurance Commission and public authorities

P:164 – It is proposed section 44 of the Insurance Commission of Western Australia Act 1986, in relation to the self insurance status of public authorities, be repealed.

ICWA does not endorse this proposal.

The WA Government has been self-insuring its liability to pay compensation in accordance with the WC&IM Act, and preceding workers' compensation legislation, since at least 1926.

The WA Government, as parent of all its public authorities which are/have been members of the RiskCover Fund and the antecedent self-insurance funds and arrangements, has essentially been operating as an exempt employer or self-insurer over the years, but has never sought exempt employer status under the WC&IM Act and the preceding legislation. The position taken has been that the Government is not required to exempt itself under its own legislation, and there has been legal support for this position.

In 1996, when the then State Government Insurance Commission Act 1986 was amended to become the Insurance Commission of Western Australia Act 1986, s44 was included with the objective of providing clarity to the forthcoming amended WA Government self-insurance arrangements for workers' compensation under the RiskCover Fund when it commenced on 1 July 1997.

Around that time, ICWA gave a written undertaking to WorkCover that it would continue to provide statistical information about covers and claims administered, as if it

were an insurer notwithstanding its role of managing the WA Government's self-insurance arrangements. ICWA also voluntarily abides by the industry developed best practice guidelines for approved insurers which WorkCover has since adopted and modified as the Workers' Compensation Licensed Insurer Best Practice Guidelines.

S44 of the ICWA Act preserves the intent for public authorities, which are members of the RiskCover Fund, to be exempt employers without the need for each public authority to seek an exemption from the Governor. Where WA public authorities are not members of RiskCover (e.g. Western Power, Gold Corporation & University of WA), they are required to obtain a workers' compensation insurance policy from an 'approved insurer' or to seek exemption from the obligation to insure under s164.

In paragraph 691 of the Discussion Paper, it is commented that the status of ICWA under the WC&IM Act is not clear. In paragraph 692, there is comment about the status of public authorities as self-insurers, and employers in their own right, implying a lack of clarity of their respective status. In paragraph 693, it is commented that in order to clarify these matters, it is proposed that the new statute deem ICWA to be a licenced (approved) insurer, and public authorities to be employers.

ICWA considers s44 of the ICWA Act clearly articulates that WA public authorities are exempt employers (self-insurers) in respect of workers' compensation, and that ICWA's role is to manage and administer these workers' compensation self-insurance arrangements, as part of its broader function under s6(c) of the ICWA Act, to manage and administer insurance and risk management arrangements on behalf of public authorities.

ICWA is of the view that it's role in managing the self-insurance arrangements of public authorities is clear.

Perhaps the new WC&IM Act might make specific mention of WA public authorities which are members of the WA Government's self-insurance fund (currently the RiskCover Fund), holding exempt employer status. But this is probably not necessary given ICWA (and its fore-runners) have been doing this for nearly a century.

P:165 – It is proposed the new statute:

i) deem ICWA an approved insurer in respect of workers' compensation obligations of public authorities;

ICWA endorses this proposal to the extent WorkCover considers it necessary. However, as not all WA Government public authorities are members of the RiskCover Managed Fund, include after "public authorities", "that are members of the Government of Western Australia's self-insurance fund". To reinforce the point above,, public authorities currently not members of RiskCover for workers' compensation cover, are; Western Power, Synergy, Verve Energy, Horizon Power, Gold Corporation, University of WA and Murdoch University.

ii) apply the claims procedure and obligations for insured employers and private insurers to public authorities and ICWA respectively.

ICWA has reservations about this proposal. ICWA supports the retention of the exemption from complying with s155D(3) of the Act. ICWA believes injury management is most effective when managed by employers. All agencies of the Fund should endeavour to coordinate injury management activities and support injured workers return to work.

Further, in paragraph 694, it is proposed that ICWA in being deemed an "approved insurer" will continue to administer a government fund and premium (fund contribution) methodology relevant to public authorities. Consistent with the RiskCover Fund being a self-insurance fund, the cover provided to public authorities in respect of workers' compensation, is broader than the standard employers' indemnity policy. This variation should also be continued.

Although not contemplated in the Discussion Paper, ICWA is currently exempt from paying a surcharge in accordance with s14 of the Employers' Indemnity Supplementation Fund Act 1980 in respect of workers' compensation cover provided to public authorities by the RiskCover Fund. This is effectively recognizing that RiskCover, as the WA Government's self-insurance fund, will never make a claim on the EISF. This should be preserved following ICWA being deemed an "approved insurer" in accordance with the proposal 165.

WorkCover and ICWA will need to work closely and agree on how to deal with other matters, where departures from the 'approved insurer' model will need to be preserved.

Mining employers – insurance obligations

P:167 – It is proposed mining employers be required to insure asbestos liabilities with approved workers' compensation insurers under standard insurance policies.

ICWA endorses this proposal. .

P:168 – It is proposed the new statute require approved insurers to indemnify mining employers for asbestos diseases from a proclaimed date.

ICWA endorses this proposal.

Conciliation filing requirement

P:169 – It is proposed the requirement to negotiate prior to filing an application for conciliation be discontinued.

ICWA endorses this proposal. Parties should still be encouraged to negotiate but it should not be made mandatory to do so. The presumed intent of this provision is to push parties to negotiation before court does not appear to be working well. Having negotiation between unwilling parties as a 'must do' before conciliation is not working.

Appearing in the Conciliation and Arbitration Services

P:171 – It is proposed the new statute specify the classes of persons who may attend on behalf of a party to a dispute.

ICWA provides conditional support for this proposal providing its claims and dispute resolution officers are still able to attend on behalf of its clients and that there is reasonable opportunity for claimants to be represented by people they choose.

Abolition of termination day

P:172 – It is proposed the termination day regime be discontinued.

ICWA strongly endorses this proposal.

Common law settlements – section 92(f)

P:176 – It is proposed the settlement of a claim for damages by agreement is void unless the common law threshold and procedural requirements are met in relation to the injury.

ICWA does not support this proposal and notes that to some extent it contradicts the proposed settlement framework outlined in proposals 92 and 93 of the discussion paper.

P:177 – It is proposed the new statute require the Director to disapprove a settlement filed under s92(f) if the common law threshold and procedural requirements are not met in relation to the injury.

ICWA does not support this proposal and notes that to some extent it contradicts the proposed settlement framework outlined in proposals 92 and 93 of the discussion paper.

Information management

P:178 – It is proposed the new statute clearly outline:

i) requirements for the provision of information to WorkCover WA;

ii) the circumstances where release of information held by WorkCover WA can occur.

ICWA conditionally supports this proposal but encourages WorkCover not to impose resource intensive reporting obligations on insurers. ICWA will publish its own statistics.

Penalties

P:180 – It is proposed the new statute introduce a penalty unit system for all offences which includes automatic indexation.

ICWA notes this proposal.

ADDITIONAL PROPOSALS FOR INCLUSION IN NEW WORKERS COMPENSATION ACT

Definition of injury and liability for stress claims

While the definition of injury has not been included in the discussion paper, ICWA considers that it should be included, particularly in the context of stress related injuries. ICWA, through RiskCover, manages approximately 60% of all stress claims in the Western Australian workers' compensation scheme. The total number of stress claims lodged with RiskCover annually is around 380 at a cost of $17.8 million. The average cost of these claims is twice that of a physical injury claim. In simple terms, many of the stress related claims ICWA receives arise from circumstances involving or surrounding a workers "performance" and the authorities have since well-established that the existing s.5(4) "stress" exclusions do not apply to those claims as there was no expectation of discipline or discipline per se.

ICWA strongly recommends consideration be given to reviewing the current definition of injury with a view to changing it to include the reference to "reasonable administrative action" the wording used in the Australian Government's, Safety Rehabilitation and Compensation Act 1988 (ComLaw / ComCare) which states :

"5A Definition of injury"

(1) In this Act:

injury means:

(a) a disease suffered by an employee; or

(b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or

(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

(2) For the purposes of subsection (1) and without limiting that subsection, **reasonable administrative action** is taken to include the following:

(a) a reasonable appraisal of the employee's performance;

(b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;

(c) a reasonable suspension action in respect of the employee's employment;

(d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;

(e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);

(f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment."

As can be seen, this definition of injury is not dissimilar to what we currently have and would provide employers with an increased sense of confidence that those claims arising from their reasonable administrative actions are capable of being defended.

It is believed that over a period of time, fewer stress related claims would be lodged and the claims costs across the WA Public Sector, at least, would ultimately reduce.

Injury Management Performance Auditing

ICWA has been closely involved with the monitoring of the injury management performance of WA Government Agencies in the RiskCover Fund. It has been ICWA's experience that the injury management requirements imposed on employers in the 2005 changes to the Worker' Compensation and Injury Management Act 1981 have not had the intended effect of improving return to work outcomes. This is likely to also be largely the case for private sector employers. While ICWA does not believe increasing requirements on employers will be of benefit, we do believe that a thorough review of an employer's injury management culture and practices can be of value. To this end ICWA recommends WorkCover WA establish an auditing program focusing on large and medium employers with high workers' compensation costs with the aim of improving return to work rates and reducing claims costs.