

Mr Chris White  
A/Chief Executive Officer  
WorkCover WA  
2 Bedbrook Place  
Shenton Park WA 6009

31 July 2014

Dear Mr White

**WORKCOVER WA REVIEW OF THE *WORKERS COMPENSATION AND INJURY MANAGEMENT ACT 1981* – FINAL REPORT**

I refer to the release of your Review of the *Workers Compensation and Injury Management Act 1981* Final Report (Final Report) in June 2014. Following our detailed submission to the Review's Discussion Paper dated 7 February 2014, the ICA supports a significant majority of the recommendations made in the Final Report.

Please find attached a table containing our members' feedback on specific aspects of the Final Report's recommendations. We do not propose making any comment in relation to recommendations 127-131 concerning self-insurance.

We take this opportunity to provide you with our detailed concerns in relation to two areas of recommendations concerning insurance obligations for mining employers and acts of terrorism.

**Recommendations 156 – 158: Mining employers – insurance obligations**

The ICA does not support these recommendations.

The ICA reinforces the concerns raised in our submission of 7 February 2014. We understand that the known liabilities from past periods have now diminished and a pool of funds is available to cover these. However, we submit that this recommendation may result in insurers providing cover for future incidents and risks which have not been actuarially assessed and priced.

We seek clarity on the proposed level of cover and dates of injury to ensure that no latent backdated exposure arises by default. We also seek clarity on the likely number of claims which would be involved.

Our members may also be subject to further reinsurance costs if their current arrangements do not respond to these risks. Our members look forward to raising these issues with you directly.

**Recommendations 159 - 160: Acts of terrorism**

The ICA strongly objects to these recommendations.

We refer you to the ICA's and our members' earlier submissions on 29 October 2012 and 7 February 2014 and reiterate our detailed concerns.

Our members advise that they may experience difficulty in obtaining reinsurance from AAA rated reinsurers for this type of risk over the cap of \$25million. Coverage for amounts over \$25million may be specifically excluded by some reinsurance contracts. As this is a commercial matter for our members, we strongly suggest that WorkCover WA discusses these issues directly with individual insurers.

Our members are concerned how the proposed increase to \$100million may be funded. If appropriate reinsurance is unavailable, this may place a considerable burden on the capital position of licensed insurers. As you would be aware the Australian Prudential Regulation Authority sets detailed prudential requirements for general insurers under the *Insurance Act 1973*.

We submit that an appropriate fund be instituted to cover potential liabilities in the event of an act of terrorism. A specific levy can then be activated as required.

In relation to recommendation 160 specifically, we seek clarity on whether the contributions referred to include the government's self insured program. In addition, what is likely to be the impact of the self-insurers' proportion on our members' contribution?

We also seek clarity on how an "act of terrorism" will be defined. Our members are concerned that any declaration made in the Federal sphere may not align with provisions in their reinsurance treaties. In this regard these treaties may also restrict the cover provided to overseas workers particularly in areas with known or predicted terrorism activity.

The ICA strongly believes that an assessment of the impact on the scheme as a whole should be undertaken before this proposal is further considered. Our members look forward to raising these issues with you directly.

We look forward to working with WorkCover WA on the range of recommendations contained in the Final Report. If you have any questions or comments in relation to the above please do not hesitate to contact Vicki Mullen, General Manager Consumer Relations & Market Development on (02) 9253 5120 or on [vmullen@insurancecouncil.com.au](mailto:vmullen@insurancecouncil.com.au).

Yours sincerely



Robert Whelan  
Executive Director & CEO

## Review of the Workers' Compensation and Injury Management Act 1981

### ICA's response to Final Report Recommendations

Number	Detail of Recommendation	Insurance Industry Response
<b>PART 1 - PRELIMINARY</b>		
<b>Definition of worker</b>		
<b>R:6</b>	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 <i>Taxation Administration Act 1953</i> (Cth).	Not supported.  The ICA strongly reinforces its previous comments in respect to the impact that changing the definition of worker may have. Under the current definition, our members experience very few claims that require arbitration. They anticipate that the proposed definition may lead to an increase in applications to determine the issue of worker, particularly following any changes to the taxation law.
<b>R:7</b>	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.	Not supported.  However, subject to the outcome of recommendation 6, the ICA would welcome consultation on any regulations that may impact particular work arrangements.
<b>Work for private households</b>		
<b>R:9</b>	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: <ul style="list-style-type: none"> <li>i) the person is employed by an employer who is not the owner or occupier of the private home; and</li> <li>ii) the employer provides the owner or occupier with the services of the person.</li> </ul>	Supported subject to comments below.  The ICA seeks clarity on the application of the recommendation in circumstances where an employer runs their business from their private home and employs a person to undertake services which may also include domestic services.

Number	Detail of Recommendation	Insurance Industry Response
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.	Supported.  We look forward to consulting further with WorkCover WA on the definition of 'prescribed circumstances'.
<b>Public company directors</b>		
R:11	It is recommended the new statute provide access to the scheme for public company directors on the same terms, and subject to the same criteria, as other working directors.	Not supported.  The ICA strongly reinforces our previous concerns. We believe that the implementation of this recommendation is likely to cause practical difficulties.
<b>Overseas workers</b>		
R:17	It is recommended the new statute include a provision for overseas workers based on an express period of cover for 24 months.	Supported subject to comments below.  The ICA reiterates our previous comments in relation to restricting the period of cover to 12 months. Further we seek clarity on the way the period in question will be calculated. Will it be for continuous periods only or is the period effectively reset if the worker returns to WA for any extent during the time period?
<b>PART 2 – COMPENSATION</b>		
<b>Claim process</b>		
R:23	It is recommended the new statute establish a consistent claim process, applicable to both insurers and self insurers.	Supported.  We look forward to consulting further with WorkCover WA during the development of the claim process.
<b>Pended claims</b>		
R:26	It is recommended the new statute establish a process for pended claims in accordance with the following: iii) payment of weekly earnings and medical expenses commence within 14 days after notice is given that an	Supported subject to comments below.  The ICA supports early intervention models however we submit that this should be balanced against obtaining

Number	Detail of Recommendation	Insurance Industry Response
	<p>insurer is unable to make a decision on liability within the required timeframe;</p> <p>iv) payment of medical expenses of up to \$5,000 inclusive of amounts paid prior to commencement of provisional payments;</p> <p>v) all payments are without prejudice;</p> <p>vi) 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.</p>	<p>the relevant claims information and reducing frivolous claims.</p> <p>We submit that the proposed 14 day limit may give rise to unintended consequences if it leads to a greater number of declined claims. This may occur if insufficient information is available to insurers to make an informed decision within the time period.</p> <p>We believe that if the number of declined claims were to increase this is likely to put further stress on CAS resources through increased number of disputes.</p> <p>The ICA submits that WorkCover WA monitor any impact on claims costs which these provisions may have and give consideration to providing CAS with resources.</p> <p>Finally, we submit that any time limits involved be placed in the regulations to enable WorkCover WA make any necessary amendments to the process as required.</p>
<b>Consent authority</b>		
<b>R:28</b>	<p>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.</p>	<p>Supported.</p> <p>We submit that the scope of the consent authority should be extended. This will allow the employer, insurance intermediary (broker) and employer appointed insurance consultant to be added to the list of parties on the claim form that the insurer is able to disclose information to. We believe that this consistency will enhance the smooth management of claims.</p>

Number	Detail of Recommendation	Insurance Industry Response
<b>Weekly payments</b>		
<b>R:30</b>	It is recommended all workers' weekly payments be calculated on the basis of their pre-injury earnings over a 12 month period.	Supported with comments below.  We look forward to consulting further with WorkCover WA on the drafting of the provision to ensure that the base award is clearly defined.
<b>Capacity to require audiometric testing</b>		
<b>R:38</b>	It is recommended WorkCover WA have the power to deem a workplace to be one where audiometric testing must occur.	Supported with comments below.  The ICA seeks clarity as to how the list will be determined. We submit that WorkCover WA institute an industry education program on the new NIHL provisions and prescribed workplaces.  We look forward to working with both WorkCover WA and WorkSafe in this regard.
<b>Processing noise induced hearing loss claims</b>		
<b>R:39</b>	It is recommended where an audiometric test indicates a 10% loss of hearing that test is deemed as <i>prima facie</i> evidence of noise induced hearing loss and the basis for a claim for compensation.	Supported.  We submit that the development of a database of relevant claimants would be of benefit.
<b>R:40</b>	It is recommended an employer/insurer may displace the <i>prima facie</i> evidence, within the prescribed timeframe with: <ul style="list-style-type: none"> <li>i) a full assessment by an audiologist or ENT if the issue relates to the percentage loss of hearing; or</li> <li>ii) an assessment by an ENT if the issue relates solely to work relatedness.</li> </ul>	Supported.  We submit that the development of a database of approved medical practitioners would be of benefit. We are also looking forward to consulting with WorkCover WA on the appropriate timeframe to be prescribed.
<b>Noise induced hearing loss claim management</b>		
<b>R:42</b>	It is recommended the claims process for noise induced hearing loss be prescribed in regulations.	Supported.  We look forward to consulting further with WorkCover

Number	Detail of Recommendation	Insurance Industry Response
		WA during the development of the claim process.
	<b>Liability for noise induced hearing loss claims</b>	
<b>R:45</b>	It is recommended the new statute provide the worker is to lodge a noise induced hearing loss claim with the employer who last employed the worker in employment to the nature of which noise induced hearing loss is due.	Supported subject to comments below.  The ICA submits that the regulations include provisions to deal with any complexity which arises if the last employer is not one which has a prescribed workplace.
	<b>Varying compensation through the Conciliation and Arbitration Service</b>	
<b>R:75</b>	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.	Supported with comments below.  We look forward to consulting further with WorkCover WA on the drafting of the provision.
	<b>Workers leaving Australia</b>	
<b>R:77</b>	It is recommended the new statute clarify when weekly payments can be suspended when a worker is outside Australia for a prescribed period.	Supported in principle with comments below.  The ICA supports this recommendation for workers residing outside Australia but believes that it should also address the situation when the insurer loses touch with a worker who moves interstate. In our members' experience this continues to occur, particularly when FIFO arrangements are in place.  The ICA submits that any worker who leaves the jurisdiction should provide medical certificates with the same frequency as those who continue to reside in WA.  Further, we submit that the statute provide for fast track applications to CAS to suspend payments if the insurer has lost contact with the worker (whether they are overseas or interstate). These applications could be

Number	Detail of Recommendation	Insurance Industry Response
		made directly to CAS for appropriate orders after a 3 month period when reasonable attempts to locate the worker have been unsuccessful.
<b>Disputes between employers/insurers</b>		
<b>R:80</b>	It is recommended the new statute clarify the provisions regarding disputes between employers and disputes between insurers, while maintaining the intent of the current provisions.	Supported with comments below.  We look forward to consulting further with WorkCover WA on the drafting of the provision.
<b>R:81</b>	It is recommended an employer or insurer who has made provisional payments of compensation to a worker be entitled to recover those payments from an employer or insurer who is subsequently agreed or determined to be liable for the injury.	Supported with comments below.  We look forward to consulting further with WorkCover WA on the drafting of the provision.
<b>Settlements</b>		
<b>R:82</b>	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.	Supported with comments below.  We look forward to consulting further with WorkCover WA on the drafting of the provision defining 'special circumstances'.
<b>PART 3 - INJURY MANAGEMENT</b>		
<b>Injury management case conferences</b>		
<b>R:94</b>	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.	Supported with comments below.  The ICA reiterates our previous comments in relation to a fast track process to refer matters to CAS to determine suspension of weekly payments. We believe that this will ensure the worker's full co-operation with the management case conference process.



Number	Detail of Recommendation	Insurance Industry Response
	<b>Regulation of workplace rehabilitation providers</b>	
<b>R:102</b>	It is recommended the new statute empower WorkCover WA to: iii) establish performance standards for workplace rehabilitation providers generally or specifically and monitor compliance with those standards; iv) adopt the provisions of other publications for the purpose of setting eligibility criteria for approval, and ongoing conditions and performance standards.	Supported with comments below.  We look forward to consulting further with WorkCover WA on the drafting of the provision defining the appropriate criteria.
<b>PART 5 - LIABILITY AND INSURANCE</b>		
	<b>Audit of remuneration declarations</b>	
<b>R:119</b>	It is recommended the new statute provide in prescribed circumstances audit costs incurred by WorkCover WA or an insurer be recoverable from an employer.	Supported with comments below.  We look forward to consulting further with WorkCover WA on the drafting of the provision.
	<b>Insurer performance monitoring</b>	
<b>R:135</b>	It is recommended the new statute provide WorkCover WA with express authority to monitor whether an insurer complies with licence approval criteria and conditions.	Supported with comments below.  The ICA submits, in order to ensure the principles of administrative fairness are applied, that a documented appeal process be put in place.
	<b>Request for insurance – obligation to quote</b>	
<b>R:137</b>	It is recommended the new statute oblige insurers to provide a quote on the premium likely to be charged, if requested by an employer.	The ICA generally supports the intent of the recommendation to provide a quote as recommended. However we seek clarification on the process involved as our members would not support the ability to cancel policies mid-term.
	<b>Approved insurer – requirement to provide insurance</b>	
<b>R:139</b>	It is recommended an insurance indemnity cover all ‘workers’ employed or engaged by the employer irrespective of any omission by the	The ICA generally supports the intent of the recommendation that ensures all workers are protected.

Number	Detail of Recommendation	Insurance Industry Response
	employer when effecting or renewing a policy of insurance.	<p>However some insurers have risk appetites defined by their particular reinsurance treaty protection. We submit that our members' capital position may be impacted if they are required to cover previously undisclosed activities that fall outside their reinsurance provisions.</p> <p>Our members look forward to raising these issues with you directly.</p>
<b>Burning cost policies</b>		
<b>R:144</b>	It is recommended the new statute provide for regulations to set out any limits, controls, terms or conditions applicable to burning cost policies, if required.	<p>Not supported.</p> <p>The ICA reinforces our previous concerns that burning cost policies involve individual commercial arrangements and should not be the subject of regulation.</p>
<b>Regulation of policy of insurance</b>		
<b>R:152</b>	It is recommended the new statute enable WorkCover WA to approve, limit or modify policy endorsements or extensions by regulation.	<p>Not supported.</p> <p>The ICA reinforces our previous concerns. We submit that the current scheme is based on responding to customer needs and underpinned by prudent decision making. Our members anticipate that attempts to regulate extensions and endorsements may negatively impact the competitiveness of the market and the ability of insurers to respond to the employer's needs.</p>
<b>Mining employers – insurance obligations</b>		
<b>R:156</b>	It is recommended the existing insurance regime for workers' compensation liabilities of mining employers be discontinued.	Not supported for the reasons provided in our covering letter dated 31 July 2014.
<b>R:157</b>	It is recommended mining employers be required to insure asbestos liabilities with approved workers' compensation insurers under standard insurance policies.	Not supported for the reasons provided in our covering letter dated 31 July 2014.

Number	Detail of Recommendation	Insurance Industry Response
R:158	It is recommended the new statute require approved insurers to indemnify mining employers for asbestos diseases from a proclaimed date.	Not supported for the reasons provided in our covering letter dated 31 July 2014.
<b>Acts of terrorism</b>		
R:159	It is recommended the <i>Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001</i> is repealed.	Strongly objected to for the reasons provided in our covering letter dated 31 July 2014.
R:160	<p><b>R:160</b> It is recommended relevant provisions of the <i>Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001</i> are integrated in the new statute with the following amendments:</p> <ul style="list-style-type: none"> <li>i) the sunset clause is repealed</li> <li>ii) the statutory definition of 'act of terrorism' be based on the Commonwealth's Criminal Code Act 1995, modified to ensure application to personal injury;</li> <li>iii) Ministerial declaration is the sole trigger to activate acts of terrorism arrangements;</li> <li>iv) contribution agreements between WorkCover WA and insurers/self-insurers be abolished. Insurer/self-insurer participation in the scheme will be automatic and compulsory with relevant provisions from agreements carried over to regulations;</li> <li>v) to account for changing market dynamics, the apportionment of liability for insurer and self-insurers will be calculated at the time of the event with annual reassessments to occur annually thereafter;</li> <li>vi) the collective liability cap for insurers and self insurers be increased from \$25 million to \$100 million per terrorist event;</li> <li>vii) the 90 day time limit for making a claim will be extended to 12 months, in line with any other claim for compensation;</li> <li>viii) the present exclusion regarding common law liabilities relating to terrorism claims be maintained.</li> </ul>	Strongly objected to for the reasons provided in our covering letter dated 31 July 2014.

Number	Detail of Recommendation	Insurance Industry Response
<b>PART 8 - SCHEME REGULATION AND ADMINISTRATION</b>		
<b>Information management</b>		
<b>R:167</b>	<p>It is recommended the new statute clearly outline:</p> <ul style="list-style-type: none"> <li>i) requirements for the provision of information to WorkCover WA;</li> <li>ii) the circumstances where WorkCover WA may release information.</li> </ul>	<p>Supported with comments below.</p> <p>We note that currently penalties and infringements are separate areas of control administered by WorkCover WA. The ICA submits that there should be parity in any increased amounts applied to infringements in line with those which are imposed as penalties.</p>