REVIEW

OF (NT) WORKERS REHABILITATION AND COMPENSATION ACT

July 2014

REVIEW OF (NT) WORKERS REHABILITATION AND COMPENSATION ACT

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ROUSSOS LEGAL ADVISORY AND CROSSINNOVATE CONSULTING

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ACRONYMS, ABBREVIATIONS AND DEFINITIONS

Actuary	A specialist who applies the mathematical theory of probability to statistics
ADR	Alternative Dispute Resolution
AEIS	Alternative Employer Incentive Scheme
AMA	Australian Medical Association
AMA4	American Medical Association guidelines for the assessment of permanent impairment, 4th edition
AMA5	American Medical Association guidelines for the assessment of permanent impairment, 5th edition
AMA Guides	American Medical Association guidelines for the assessment of permanent impairment
ATO	Australian Taxation Office
AWE	Average Weekly Earnings for Full Time Adult Persons, Weekly Ordinary Time Earnings for the Northern Territory last published by the Australian Statistician
CAT	Civil and Administrative Appeals Tribunal
Clinical Framework	Clinical Framework for the Delivery of Health Services[1]
FIFO	Fly-in fly-out and Drive-in drive-out(DIDO). Fly in fly out "is a method of employing people in remote areas by flying them temporarily to the work site instead of relocating the employee and their family permanently."[2] Includes workers who attend the work site via vehicle on a "drive in drive out" basis. Employees work on a rotational basis and return home during days off
Hanks	Safety, Rehabilitation and Compensation Act Review, Report, February 2013

1 See www.worksafe.vic.gov.au/forms-and-publications/forms-and-publications/clinical-framework-for-the-delivery-of-health-services

2 http://en.wikipedia.org/wiki/Fly-in_fly-out

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Hopkins Agreement	A workers' compensation agreement under which a lump sum amount is payable under workers' compensation legislation; there is no exclusion or limitation of the application of, or the rights or entitlements of a person under, that legislation; and the amount is repayable if those rights or entitlements are pursued. The name is derived from the decision of Justice Angel, Northern Territory Supreme Court in the matter of *Merle Hopkins v Collins/Angus & Robertson Publishers Pty Ltd (1997)*
HWCA	Heads of Workers' Compensation Authorities
Long tail claims	The financial outcome for these claims will not be known with certainty for several years
Loss ratio	The proportion of claims paid or payable to premiums earned
NDIS	National Disability Insurance Scheme
NIIS	National Injury Insurance Scheme
NT	Northern Territory of Australia
NWE	Normal weekly earnings (as defined in section 49 of the WRCA)
PI	Permanent impairment
PILDA	(NT) Personal Injuries (Liabilities and Damages) Act
Purcal and Wong	Australian Workers' Compensation: A Review; October 2007, Dr. Sachi Purcal and Arlene Wong
Preliminary Report	The Review of (NT) *Workers' Rehabilitation and Compensation Act* Preliminary Report dated November 2013
Report	This report
Review	This review
RTW	Return to work
Scheme	Northern Territory workers' compensation scheme
Short tail claims	Insurance business where it is known that claims will generally be notified and settled quickly
SI	Serious injury

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SME	Small to medium enterprise
Step down	Weekly payments are 'stepped down' by a percentage or to a set amount for workers who cannot earn an income because of a work related injury
Subrogation	The right of an insurer to recover any claim payments by standing in the place of the insured in taking any actions against third parties
TAA	(Cth) Taxation Administration Act 1953
Weekly payments	Income replacement payments in accordance with sections 64 and 65 of the WRCA
WRCA	(NT) Workers' Rehabilitation and Compensation Act
WRCAC	Workers' Rehabilitation and Compensation Advisory Council

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1. PURPOSE AND ACKNOWLEDGEMENTS

The purpose of this review is to consider reforms to the WRCA in accordance with the Terms of Reference[3].

Our review team comprises George Roussos and Mark Crossin supported by Melanie Blackman and resources provided by NT WorkSafe, guided by the Northern Territory Workers Rehabilitation and Compensation Advisory Council.

The project team thanks a range of representatives of organizational and scheme stakeholders, including employers, unions, medical, legal, insurers, rehabilitation providers, mediators and expert consultants in the field of workers' compensation and rehabilitation for their engagement with the review and for their considered feedback and input into both the preliminary and final reports.

Authors of various reports and presentations considered as part of the review are also acknowledged for their efforts to inform and assist both the necessary research and the development of this report.

In particular, we wish to thank Alan Clayton of Bracton Consulting Pty Ltd for his feedback on our Reports and wise guidance.

Thanks are also extended to the Department of Business and to NT WorkSafe's Rehabilitation and Compensation team for their cooperation and support throughout the review process. We are grateful for the support and assistance provided to us by Bevan Pratt, Geoff Anstess and Ros Miller; and for the leadership of NT WorkSafe provided by Doug Phillips and Stephen Gelding.

We were assisted by the many submissions and meetings. We thank all authors and participants for sharing with us their views and making available their time.

Finally, we thank the Northern Territory Government, and Minister Tollner, the Minister for Business, for the opportunity to serve the Territory in the Review of the Scheme. We hope our contribution is productive of assisting the further development of the Territory with a balanced Scheme.

[3] *See Annexure 1*

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2. EXECUTIVE SUMMARY

It is clearly in everyone's interest for rehabilitation and return to work to remain the core aims of the *Workers Rehabilitation and Compensation Act (WRCA).* There are several recommendations made in this regard, including in relation to the Alternative Employer Incentive Scheme (AEIS), clarifying the roles of employer and employee; capping of some benefits and providing greater options to stakeholders in managing claims.

Most injured[4] workers return to work well within 13 weeks post injury; and the overwhelming number[5] by 26 weeks. The entitlement to weekly compensation is 100% of NWE for the first 26 weeks of incapacity; after which time there is a step down to 75% of NWE.

Regarding the duration of benefits, the Northern Territory workers' compensation scheme is open ended and does not discriminate between the less seriously injured and the more seriously injured.

We feel it reasonable and consistent with the major Australian workers' compensation jurisdictions, and the view of the Heads of Workers' Compensation Authorities (HWCA), that the maximum duration of non-serious injury claims be 260 weeks (5 years).

Accordingly, we recommend the maximum duration of weekly compensation for claims involving injury assessed at less than 15% of the whole person on the relevant AMA guides[6], ends after 260 weeks of incapacity. In relation to medical and related expenses, we recommend this entitlement conclude 52 weeks after the end of the entitlement to weekly compensation.

For workers with a serious injury[7], weekly payments of compensation should continue to retirement with lifetime medical care, as is presently the case.

Although, putatively, a long tail pension scheme, the NT Scheme is marked by significant amounts paid by way of lump sums. As stated, the primary focus should be on return to work and rehabilitation. However, we recognise stakeholders require the option to settle and close claims by negotiated agreement. Accordingly, we recommend the WRCA allow for negotiated agreements.

In relation to all claims, a negotiated agreement can be made at any time, in compliance with certain criteria. Consistent with the assessment of damages at common law, we believe the negotiated agreement should be guided by providing for a discount rate and consideration of assumptions about the injured person's future earning capacity, similar to principles currently applying to common law claims in the NT[8].

The people working in the Scheme, particularly, case managers, rehabilitation providers and others, are key to the successful operation of the Scheme. We recommend NT WorkSafe work with registered training organisations to develop relevant and recognised educational pathways for careers in relation to NT workers' compensation law and practice.

[4] *72%, Safe Work Australia Comparative Performance Monitoring Report 15th Edition pp8, 38, and 54-55.*

[5] *85%, Ibid pp8, 38, and 54-55.*

[6] *As recommended in this report.*

[7] *Those injuries assessed at 15% or more of the whole person on the relevant AMA guides, excluding secondary medical conditions.*

[8] *Sections 21 and 22 PILDA.*

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3. KEY POINTS

- A separate category for serious injury (defined as WPI 15% or greater). Serious injury claims to be paid weekly benefits to retirement age; plus all medical and care services for life.
- All other claims, income maintenance ceases after 260 weeks (5 years) of incapacity.
- Medical and related services will end after the entitlement to income maintenance has ceased for 12 months.
- All times limits are in the aggregate, recognising incapacity may not be continuous.
- Adopt AMA5 with modifications as proposed by NT WorkSafe.
- Provide for machinery enabling negotiated settlements and the closure of claims in the appropriate cases.
- Provide legislative tools for the development of individual budgets for workers suffering permanent or long term incapacity; and assistance for those considering self-employment.
- Retain a broad based definition of worker; or consideration be given to a PAYG based definition of worker.
- Compensability of ordinary diseases of life (such as heart attacks and strokes caused by degenerative disease and similar phenomena) only where employment is the real (or dominant), proximate or effective cause of the incident.
- Substantial increase of the lump sum death benefit; and in reimbursement for the cost of the funeral. Provision of a new benefit for family counselling.
- Medical certificates to focus on the worker's capacity.
- Development of guidelines based on the schedule of fees recommended by health professional organisations.
- Provide definitions for 'workplace based return to work program' and 'suitable employment.'
- Provide 'return to work plans' for workers exceeding 10 days absence from work due to work-related injury.
- Add a procedure around the '104-week rule', and require the employer to give the worker written notice of the review, setting out relevant information.
- Presumptive legislation for firefighters.
- Review the definition of NWE; and define non-cash benefits.
- Allow legal representation at Mediations. Employers / insurers to meet the worker's costs of legal representation at Mediation.
- Enhanced provisions relating to the exchange of information regarding Mediations.
- NT WorkSafe to review and substantially increase the fraud penalties provisions in the WRCA; and update penalties in the legislation, including the introduction of infringement notices to secure scheme compliance.

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4. INTRODUCTION

The Northern Territory workers' compensation scheme is a privately underwritten, no-fault, pension-based workers' compensation scheme. There is no recourse to common law[9] against the employer[10] for workplace injuries in the Northern Territory; and there has not been for almost 30 years.

With one step down only[11], weekly payments continue to retirement[12]; loss of earning capacity is assessed against a claimant's uncapped pre-injury earnings; and there is no dollar cap or duration limit on medical, surgical or rehabilitation costs.

Whilst the existing Northern Territory long tail workers' compensation scheme has survived a considerable period of time[13], there are indications that, in its current form, the Scheme may not be sustainable in the longer term.

SCHEME PERFORMANCE AND PREMIUM RATES

The following table sets out a comparison of premiums and funding ratios among the Australian jurisdictions:

	AVERAGE PREMIUM RANGE 2008 – 2012 (%)	AVERAGE PREMIUM IN THE 2012 YEAR (%)	AVERAGE PREMIUM IN THE 2013 YEAR (%)	FUNDING RATIO (2012) (%)	FUNDING RATIO (2013) (%)
NT	2.10 – 2.31	2.17	2.31	79.3	92.0
Victoria	1.34 – 1.46	1.34	1.30	96.0	108.0
Comcare	1.20 – 1.55	1.41	1.77	65.0	N/A
Queensland	1.15 – 1.42	1.45	1.45	119.0	138.0
NSW	1.55 – 1.72	1.55	1.68	91.0	102.0
WA	1.50 – 1.85	1.57	1.69	126.0	N/A
Tasmania	1.82 – 2.19	2.19	N/A	111.0	N/A
ACT	2.39 – 2.67	2.52	2.37	N/A	N/A
SA	2.75 – 3.00	2.75	2.75	60.2	63.7

Source: Safe Work Australia

[9] *In 1987, the Territory workers' compensation scheme abolished an employee's right to sue the employer for damages (at common law) in the event of negligence.*

[10] *Common law claims are available against negligent third parties.*

[11] *There is a step down after 26 weeks of incapacity.*

[12] *Sections 64 and 64.*

[13] *The predecessor to the WRCA, the Work Health Act, was introduced on 1 January 1987.*

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The Northern Territory Scheme's funding ratio has improved between 2012 and 2013, albeit the funding ratio remains less than 100%. In 2013, the Northern Territory premium was 30% higher than the average[14] of five other Australian jurisdictions[15].

LUMP SUMS

In 1997, the Hopkins Agreement was developed in response to growing pressure to resolve claims by lump sum payment. At the time of creation, Hopkins Agreements[16] were used to settle disputed claims, either in law, fact, or both. Even though government policy was against the payment of lump sums and the payment of lump sums is specifically limited by the WRCA, stakeholder demand for this product to achieve closure of claims has continued seemingly unabated for close to 20 years.

The payment of lump sums became sufficiently prevalent, that NT WorkSafe created a payment category to allow for this type of lump sum payment to be measured and be taken into account by the Scheme Actuary.

As shown in the following table, lump sum payments comprise about 30% of the total amount spent on claims (and half of the costs of compensation for incapacity), resembling a common law / lump sum scheme.

YEAR ENDING	TOTAL PAID	TOTAL PAID FOR INCAPACITY BENEFITS	TOTAL PAID BY LUMP SUM (HOPKINS AGREEMENTS AND COMMUTATION)	PERCENTAGE OF LUMP SUM PAYMENTS TO TOTAL PAYMENTS
30 June 2012	$83,219,852	$26,783,577	$25,125,936	30.2%
30 June 2013	$90,346,123	$29,288,145	$28,197,343	31.2%

Source: NT WorkSafe data from approved private insurers.

SCHEME SUSTAINABILITY AND LUMP SUMS

In view of the pattern of payments and the proportion of the amount of claims expenses paid by Hopkins Agreement[17] in the form of lump sums, we infer that, regardless of the overarching policy of maintaining a long tail or pension based scheme, workers and employers / insurers prefer the certainty lump sums may provide, over periodic payments.

It seems to us that, further to the convenience of lump sum payments, and although it would be difficult to establish empirically:

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[14] *Roussos, G. and Crossin, M. (2013) Preliminary Report into a review of the NT Workers Rehabilitation and Compensation Act-See discussion of Hopkins Agreements, Established 1997-1.58%.' pages 64, 71 and 72.*

[15] *Safe Work Australia (2013) Comparative Performance Monitoring Report Edition 15th Edition -Vic, Comcare, Qld, NSW, Tas' pp 23-24.*

[16] *Roussos, G. and Crossin, M. (2013) Preliminary Report into a review of the NT Workers Rehabilitation and Compensation Act-See discussion of Hopkins Agreements, Established 1997NT Supreme Court.' pp 64, 71and 72.*

[17] *Ibid-See discussion of Hopkins Agreements in the Preliminary Report, November 2013 at pages 64, 71 and 72.*

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- The payment of lump sums by Hopkins Agreement may have helped sustain the Scheme for a period longer than would otherwise be the case.
- Possibly, absent a closure strategy enabled by the Hopkins Agreement, the Scheme may have faced greater financial challenges.

If that is the case, then, prudently, the Scheme should not rely on an informal mechanism such as the Hopkins Agreement to continue to sustain itself. Accordingly, in view of these matters, we believe the current benefit structure should be reviewed; and the long tail nature of the Scheme and uncapped benefits requires both examination and reform.

The situation regarding other jurisdictions (and leaving aside Comcare and the changes to the South Australian workers' compensation scheme foreshadowed in late 2013 and announced in early 2014) is that most:

- Delineate between seriously injured workers who are unable to work; and less seriously injured employees who can return to productive work.
- Have mechanisms to limit claim duration, after a designated period, for most claimants.
- Provide, either formally or informally, lump sums to the more seriously injured.

CIRCUMSTANCES IN THE NORTHERN TERRITORY

There are unique circumstances in the Northern Territory, including a small population, distance and high costs. We have a small:

- Number of approved insurers.
- Premium pool.
- Population (spread over great distances).
- Workforce (of uneven income and spread).

In relation to the Scheme, we know:

- Generally, the workforce is comprised of higher income earners.
- There are no caps to medical and rehabilitation costs.
- Mining, pastoral, construction and tourism are significant industries.
- Legislative mechanisms do not exist to permit finalisation of complex claims.
- There is an itinerant population.
- The availability of specialised medical services and rehabilitation infrastructure is limited.
- Cases are resolved via a traditional court system; there is no specialist compensation tribunal.

In his report on medical costs and intervention in the Northern Territory in 2001, Dr Trevor Lord[18] points out the "Northern Territory health system has some unique features"; namely:

[18] *Lord, T. (2001) 'Review of the Medical and Associated Intervention, December 2001' p8.*

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- There is limited access to medical specialists.
- An estimated 90 percent of admissions to hospital for work injuries are to public hospitals with many of those injuries not being reflected in workers' compensation claim numbers.
- The number of medical and allied health service providers is small and communicate on a regular basis.
- Access to independent medico-legal consultations is expensive and difficult.

Although Lord reported in 2001, the factors he identified largely remain the same today.

DURATION OF CLAIMS

Regarding the duration of claims, it is recognised that two major drivers of cost are the number of claims and the total duration of claims.

Occupational health and safety laws are aimed at reducing risks of injury and therefore lowering claims. To this end, the NT trend in both occupational health and safety incidents (and in claim numbers) under both the 2002 – 2012 and the 2012 – 2022 National OHS Strategy targets are continuing to reduce by approximately 4% per annum.

In the event of work injury, we have a responsibility to rehabilitate and return injured workers back to work as quickly as possible. The 2012 Return to Work Monitor[19] shows the Territory's return to work rate was 85% and durable return to work rate was 74%. Similarly, the Australian average was 84% and 75% respectively. Whilst these findings appear acceptable, they are arrived at by very limited sampling in the NT and disguise, along with medical presentations that do not result in claims, NT return to work rates that need to improve. In addition, Dr Cindy Wall's research[20] significantly indicates that few claimants are aware of or have return to work plans.

A small[21] proportion of claims remain on incapacity benefits for a period exceeding 12 months. Lord[22] points out that for "work injuries that persist beyond 30 days there is an extraordinary increase in the difficulty of assisting the worker to return to productive employment. There is also a major escalation in the costs of medical services and rehabilitation."

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[19] *Campbell, S. (2012) '2011/12 National Return to Work Monitor Report Australia and New Zealand'.pp1-82.*

[20] *Wall, C. (2012) 'NT WorkSafe Workers' Compensation Claimant Satisfaction Survey 2011-12 pp 1-7.*

[21] *6%, Safe Work Australia (2013)'Comparative Performance Monitoring Report 15th Edition' p8.*

[22] *Lord, T. (2001) 'Review of the Medical and Associated Intervention, December 2001' p9.*

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LUMP SUMS

The policy reasons against the payment of lump sums so far are acknowledged and understood.

However, worker groups, unions, insurers and employers were in favour of lump sums; and there was support for the legislated ability to pay lump sums to achieve finality of claims and allow for greater certainty in assessing future premiums.

There are several advantages to the payment of lump sums including the following, which were identified by Justice Mildren[23]:

- The employee may enjoy his or her choice of employment; and does not wish to participate in anything the insurer or employer has in mind.
- The employee may wish to avoid future disagreements with the insurer or employer over his or her benefits.
- The employee wishes for stability and some sense of control over their life.
- Health providers may be of the view the employee's condition may not improve while the employee is receiving weekly benefits.
- To regain his or her independence and self-esteem by severing his or her relationship with the employer and the insurer.
- Sometimes, it is desirable to bring the relationship to an end if it can be done without any harm or hardship to either the employee or the employer.

Whilst there are many positive features of a payment of a lump sum, the availability of lump sums should not detract from early intervention, rehabilitation and return to work.

We note that unlimited access to common law for workplace related injury has been inimical to early and durable return to work efforts. In that regard, we understand the experience in some jurisdictions (Victoria, New South Wales and South Australia) is that the availability of common law significantly affected the viability of a number of other schemes in the past. We understand this risk and we see that other jurisdictions, nevertheless, incorporate various lump sum alternatives, such as payment redemption, as a means of achieving claims finality.

Formal or not, the practice in the Northern Territory for lump sums is now entrenched and an inherent part of the Scheme.

[23] *Mildren J, Normandy Woodcutters Ltd & Anor v Simpson [2002] NTSC 43, at 49.*

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MANAGING THE SCHEME

The WRCA is relatively uncomplicated. The legislation supporting some other schemes is very complicated and complex. If we are going to have a successfully managed Scheme, we should maintain the relative uncomplicated nature of our legislation.

We would not advocate a re-writing of our legislation (as South Australia has indicated they would do with theirs). As noted in the Preliminary Report, such a task would be, in any event, beyond the scope allowed for in this Review. Further, we should be mindful that wholesale legislative change needs to take into account the costs to industry of re-training, re-skilling and changes to IT systems, among other matters.

Trained and qualified people are essential to the viability of a scheme. One of our recommendations is NT WorkSafe work with registered training organisations to develop relevant and recognised educational pathways for careers in relation to NT workers' compensation law and practice.

WHERE TO FROM HERE?

We know:

- About 6% of claimants remain on incapacity benefits for a period exceeding 12 months.
- Cases of serious personal injury whilst relatively small in number, account for a large portion of total costs (often involving lifetime, medical care and extensive rehabilitation).
- Cases of minor injury costs can also incur significant cost. Cases not appropriately addressed on a timely basis can drive up costs significantly and quickly also.
- Costs can be saved from properly managing these cases.
- Caps on the duration and quantum of injury benefits are warranted.
- Higher income workers have the capacity to purchase income protection insurance to top up statutory benefits.

No compensation scheme will ever properly and fully compensate an employer and employee for workplace injury. Aside of the cost of premium, for the employer there is the loss a valued employee, loss of productivity and costs of replacing the employee. For the employee, there is loss of opportunity, personal costs that are never compensated; and the impact on family.

In the event of injury, how do we structure a level of benefits that takes into account all the issues and provide a fair balance? What objective measures should be used to assess impairment and incapacity? Are the benefit arrangements fair and sustainable?

There are many views on these issues and this area of social policy can involve emotions and opposing, but equally valid views. As Lord[24] points out as "little as 10 percent of cases are responsible for the vast array of strong views within the community on how the whole system should be changed or reformed."

[24] *Lord, T. 'Review of the Medical and Associated Intervention, December 2001' p9.*

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We have been informed in this Review by face-to-face meetings held with stakeholders and over seventy formal submissions[25]. We have also had regard to recent reviews of workers' compensation legislation and scheme design which have occurred, or are in progress in the Commonwealth, Victoria, New South Wales, Queensland, Western Australia, Tasmania, and South Australia. It is both timely and instructive to learn from each of these reviews and their findings in the context of continuous improvement for the Scheme.

The issue has become – how do we maintain the benefits of a 'no-fault' scheme with coverage of all employees paying adequate compensation to injured people – but make changes to differentiate between seriously injured workers who are unable to work; from less seriously injured employees who can return to productive work; allow an exit with a lump sum at the appropriate time and for the appropriate amount, avoiding common law; and consistent with the primary focus of rehabilitation and return to work?

Noting workers' compensation is a complex and dynamic business, our recommendations hopefully provide an answer, or at least provide some pathway towards adjusting our Scheme to ensure scheme sustainability and the guiding principles[26] are met.

[25] *Refer Annexure 2, Schedule of Submissions.*

[26] *Roussos, G. and Crossin, M. (2013) Preliminary Report into review of the NT Workers Rehabilitation and Compensation Act'p22.*

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5. RECOMMENDATIONS

	RECOMMENDATION	BACKGROUND	PAGE REFERENCE
1	The Northern Territory retain a broad based definition of worker. If the current results based definition of "worker" proves to be difficult to apply, then we recommend consideration be given to a PAYG based definition of worker.	Difficulty in establishing all three of the criteria in the current definition could capture persons who might be otherwise regarded as independent contractors.	29
2	Section 82(4) be amended to reflect the broader intent of the authorisation on the claim form.	The legislation provides that when claiming compensation a worker must authorise the release "to his or her employer and the employer's insurer of all information concerning the worker's injury or disease." The authorisation forms part of the claim form. For the efficient management of a claim it is often necessary for information concerning the worker's injury or disease to be provided to others besides the employer and insurer, such as medical practitioners, rehabilitation providers, investigators, legal practitioners, and other experts and consultants.	30
3	Taxi drivers not party to bailment agreements to be recognised under the definition of worker (in a similar way to the relevant Queensland provisions).	Although taxi drivers are deemed workers, as no approval has been provided by NT WorkSafe under the Regulations, the common law position regarding taxi drivers continues to apply. Queensland transport legislation sets out the requirements of a taxi service bailment agreement, including a list of matters that need to be included in the bailment agreement, such as percentage of the takings; who pays for fuel; that the driver contributes to the cost of premiums for insurance; and other provisions related to insurance.	31

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
4	The AEIS be retained and NT WorkSafe promote the AEIS to stakeholders, in particular insurers and rehabilitation providers. NT WorkSafe to further promote the AEIS through the Department of Business networks.	The AEIS has been in operation for several years. Referral to the AEIS is required where the employer is unable to provide suitable employment. The AEIS could assist address labour shortages by employers' identifying the need for employees and design programs for injured people with a commitment to employment.	33
5	NT WorkSafe to provide information about the benefits to industry of return to work options; injury management; and early and prompt formulation of injury management or return to work plans.	Although the obligations on the employer and employee in sections 75A and 75B of the WRCA are clear, simple and explained by the Courts, there is strong support for greater employer and worker accountability and involvement in rehabilitation and return to work. NT WorkSafe could have programs to: ▶ Better communicate return to work options and the benefits for the employer and employee. ▶ Increase the understanding of return to work options. ▶ Provide further and better information regarding injury management. ▶ Encourage the appointment of return to work coordinators (particularly for the larger employers). ▶ Encourage early and prompt formulation of injury management or return to work plans.	35
6	Reform the definition of 'rehabilitation' along the lines of section 40 and regulation 109 of the Queensland legislation.	Stakeholder feedback indicated there was a need to better understand what rehabilitation means. The Queensland definition provides a comprehensive definition that is intuitive and clearly understood and provides for the worker to be treated with appropriate respect and equity.	37
7	Define 'workplace based return to work program' similar to that the definition of 'workplace rehabilitation plan' proposed by Hanks (as including the provision of appropriate services which are aimed at maintaining the employee in, or returning them to, suitable employment (with the services being defined)).	Stakeholders expressed a need for clear meaning and definition of the intent of return to work programs. The terms 'rehabilitation training' and 'workplace based return to work program' are not defined. Dr Cindy Wall's research indicates that RTW plans are not widely known nor used by employers or workers.	38

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
8	'Suitable employment' could be defined to include criteria similar to that in the definition of 'most profitable employment' (such as the workers age; experience, training and other existing skills; (c) potential for rehabilitation training; (d) language skills; (e) the impairments suffered by the worker; (f) self-employment; (g) other location).	Whilst an employer is required to assist an injured worker with 'suitable employment', that expression is not defined. The legislation, however, sets out factors in assessing 'most profitable employment.'	39
9	In relation to the '104-week rule', add a procedure requiring the employer to give the worker written notice of the review, setting out relevant information.	After 104 weeks of incapacity, 'loss of earning capacity' is assessed on the basis of the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her. There is currently no machinery around how that would be applied.	40
10	The provision for the payment of reasonable expenses for family counselling; financial counselling; and employment counselling in relation to rehabilitation.	Counselling is specifically mentioned only once in the legislation, and that relates to financial counselling supporting application for the commutation of weekly payments. The provision for broader counselling and support at an early stage, including in relation to a worker's family would assist the process of rehabilitation.	41
11	NT WorkSafe liaise with other jurisdictions, the AMA and other key stakeholders to adopt as appropriate guidelines developed for the treatment of common work injuries.	There was support for the development of guidelines referring to the information developed in other Australian jurisdictions and internationally, in relation to the treatment of common injuries.	41
12	NT WorkSafe to develop guidelines based on the schedule of fees recommended by health professional organisations such as the AMA and the Australian Psychological Society. Care should be taken that rates do not result in reduced access to treatment across the NT but include fees for initial medical certificates and for common items.	Save for the requirement that medical costs be 'reasonably' incurred, the WRCA makes no provision for the regulation of the cost of medical, surgical and rehabilitation treatment and hospital treatment.	42
13	NT WorkSafe should continue work in relation to the adoption of the Clinical Framework in the Scheme.	The Clinical Framework for the Delivery of Health Services is an evidence-based policy framework that outlines a set of five guiding principles for the delivery of allied health services to injured employees.	42

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
14	Medical certificates should be revised to focus on the worker's capacity for employment, rather than incapacity; and import from the Clinical Framework, and the UK fit note the appropriate matters that should be reported on. There is no reason the medical certificate should not be titled the 'Statement of Fitness for Work.'	A key function of medical certificates is to describe the diagnosis, cause and nature and extent of incapacity including restrictions; and to guide workers and employers in relation to injury management and return to work.	43
15	Consistent with the nationally harmonised approach to permanent impairment assessment, the Northern Territory adopts AMA5 with modifications as proposed by NT WorkSafe and advised to SafeWork Australia and that assessor accreditation and training be provided if practicable.	Currently, the assessment of impairment on a whole of person basis relies on AMA4. Jurisdictions use AMA guides or variants as part of their permanent impairment assessment processes which include the establishment of panels of doctors that translate AMA guides into local guides.	44
16	Section 85 of the WRCA to be clarified to confirm that where the employer defers liability, in addition to making payments of weekly compensation, an employer should also meet the reasonable costs for medical and rehabilitation costs (limited to medical and rehabilitation costs that arise from treatment provided during the period of the deferral; and on the basis discussed in the Report). The nature and extent of the liability for medical expenses should be defined.	In the case of a decision to defer the consideration of liability, there is a requirement on the employer to make weekly payments of compensation, and, in the case of claims for mental stress, engage in rehabilitation. However, it is not clear that medical expenses may, provisionally, also be paid.	45
17	There should be a right of recovery where an injured employee has acted dishonestly; the claim is fraudulent; or an injured employee has obstructed or delayed the determination of the claim, and liability is subsequently determined not to exist.	Regarding the payments made on a without prejudice basis in the event of a decision to defer liability, the legislation provides that, in the event the employer is not liable for the claim, those payments cannot be recovered. There should be provision to allow for recovery in certain circumstances.	45

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
18	Provide legislative tools for the development of individual budgets for workers suffering permanent or long term incapacity; and assistance for those considering self-employment.	The statutory benefits set out in legislation are the minimum sums due to a claimant. Even though an employer or insurer can pay for items over and above the minimums set out in the legislation, some structure around this would encourage innovation in claims service delivery. Claims management can be improved for the benefit of worker and employer with legislation supporting the formulation of individual budgets; and financial help towards remunerative activity.	46
19	Provide for the cost of a funeral to increase to the lesser of the cost of the funeral or 20% of the annual equivalent of AWE; the lump sum payment provided in section 62(b) to increase to 364 times AWE. In addition, a new benefit, being financial assistance for counselling for family members to a maximum of 5% of the annual equivalent of AWE.	Currently, in the event of the death of a worker, the benefits payable are the lesser of the cost of the funeral or 10% of the annual equivalent of AWE; a lump sum of 260 x AWE; and a weekly payment of 10% of AWE to prescribed children.	47
20	NT WorkSafe carries out a review of recurrences and reactivation of claims and determines whether to place eligibility criteria around recurrences and whether to place time limits. In particular, that the legislation includes a process and time limits for the reopening or reactivating of existing claims.	The WRCA does not provide for a mechanism to deal with a recurrence of a compensable injury following the closure of a claim. Given the absence of formal mechanisms to deal with recurrence claims, employers and insurers will vary in approach. Stakeholders have submitted that a mechanism should be introduced to allow for recurrences to be managed.	47
21	Consideration be made to adopting provisions similar to sections 533 – 537, (Qld) *Workers Compensation and Rehabilitation Act*; and allow for infringement notices as an alternative to prosecution.	The fraud and penalties provisions in the WRCA should be reviewed generally. Aside of information given to inspectors, the WRCA is absent specific provision for fraud or misleading information relating to information provided to insurers and self-insurers.	48
22	The WRCA be amended to replace the current formulation of ‘administrative action’ with ‘management action’ using section 40 of the (Vic) *Workplace Injury Rehabilitation and Compensation Act* 2013 as a model.	Regarding mental stress claims, there is a defence of reasonable administrative action and reasonable disciplinary action. This broad and general formulation has been interpreted in a way that limits its functionality.	49

RECOMMENDATION		BACKGROUND	PAGE REFERENCE
23	The WRCA should be amended so that ordinary diseases of life are not compensated; and incidents that are a manifestation of an underlying disease (such as heart attacks and strokes caused by degenerative disease and similar phenomena) will be covered for workers' compensation purposes on the same basis as a "disease"— that is, where employment was the real (or dominant), proximate or effective cause of the incident.	Even though there is a requirement that employment be 'the' real, proximate or effective cause of a disease, strokes and heart attacks involving rupturing or frank injury to arteries, for example, can be considered frank injuries, and therefore compensable without need to prove employment was the real cause.	50
24	NT WorkSafe reviews the definition of NWE. A consolidation of the definition of NWE, along the lines of an example suggested by Hanks could be considered – that the average remuneration of an employee before an injury is taken to be the average amount paid to the employee where remuneration includes, but is not limited to: ► Wages and/or salary. ► Any regular and required overtime. ► Allowances that relate to a skill the employee has or a service the employee provides. ► Any earnings from other employment the employee undertakes in addition to her or his work with the employer, if: a full-time employee can demonstrate permission from their employer (if required) to engage in outside employment; and an employee (either full time or part time) can demonstrate the additional employment was regular—that is, they were engaged in additional employment for at least six weeks in the 13 weeks before injury. ► Remuneration does not include allowances paid in relation to expenses incurred.	The calculation of NWE is of key importance. Employer payment declarations are completed, and premiums are calculated, on the basis of NWE. Weekly compensation is paid on the basis of NWE. The WRCA refers to 'remuneration' frequently through the legislation. However, save for some instances, the term 'remuneration' is not defined.	54
25	Non-cash benefits are assessed at the actual value of those benefits, or $500 whichever is the lesser.	In relation to the non-cash benefits of accommodation, meals and electricity, the basis of valuation is not spelled out in the legislation.	54

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
26	After 26 weeks of incapacity, a workers' NWE should be capped at 250% of AWE.	For the first 26 weeks of incapacity, weekly payments are paid at the workers pre-injury level, as calculated in accordance with the definition of NWE. However, at the appropriate time, there should be an upper limit regarding NWE.	56
27	Formal notice be provided to the worker of the pending step down; and the step down not to take effect until 14 days after the worker has been notified.	The worker should be provided with advance notice of the approaching step down.	57
28	A separate category for serious injury (defined as WPI 15% or greater). The assessment of impairment should be limited to the primary injury and exclude secondary injury, such as functional overlay. Serious injury claims to be paid weekly benefits to retirement age; plus all medical and care services for life. Regarding all other claims, income maintenance ceases at the 5 year point; and medical and related services will end after the entitlement to income maintenance has ceased for 12 months. In relation to medical and rehabilitation benefits, there should be a duration limit of 52 weeks after the cessation of weekly payments.	The consensus around Australia is to limit the duration of weekly payments and the duration of medical costs. Currently, no provision is made in the WRCA to distinguish the seriously injured from the less seriously injured. The HWCA recommended a duration limit of five years for incapacity benefits; and continuing to retirement for serious injury.	58
29	We recommend that Alternative Dispute Resolution (currently Mediation) under the WRCA allow for parties to engage legal representation.	Mediation is compulsory, lawyers are not normally allowed and the mediation must be held and dealt with promptly. Workers are often in a position of disadvantage in the mediation as they do not have access to advice and support.	62
30	NT WorkSafe to approve a fee (eg $1,500) payable by the employer or insurer for workers to obtain legal advice of and incidental to the Mediation.	Currently, the parties must bear their own costs of the Mediation. To facilitate the obtaining of advice by workers, there should be some provision to assist with legal costs.	63

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
31	The mediation provisions be enhanced by the creation of protocols similar to Practice Direction 6 modified to maintain as little formality and technicality, and with as much expedition, as the requirements of the WRCA and a proper consideration of the matter permits.	The mediation provisions were aimed at reducing the time taken to deal with disputes. This was to be achieved by providing for the early disclosure of information by the parties; requiring the parties to clarify and consider issues in dispute; and provide an opportunity to settle the dispute. The overall process, including disclosure of information, can be assisted by adopting a similar protocol to Northern Territory Supreme Court Practice Direction 6.	65
32	NT WorkSafe have input into the development of the NT CAT with a view to further considering the merit of transferring the adjudication of disputes under the WRCA to the NT CAT.	The Northern Territory is to create a Civil and Administrative Appeals Tribunal.	65
33	NT WorkSafe to continue its work with Safe Work Australia and consider revising Schedule 1 of the WRCA after the results of Safe Work Australia's deemed diseases work are available.	The WRCA sets out at Schedule 1 a list of diseases that are deemed to arise out of employment. Schedule 1 has not been revised for a considerable period of time. Safe Work Australia has commenced a 'Deemed Diseases Project' with the objective of developing an up-to-date Australian list of deemed diseases.	66
34	New presumptive workers' compensation legislation as either part of an amended WRCA or new legislation to benefit full time firefighters who contract cancer in the performance of firefighting duties. Schedule 1 of the WRCA be revised with a specific schedule of deemed diseases to include reference to the 12 types of primary site cancer as well as asbestos and liver cancers which are to be covered by the presumption with the accompanying qualifying periods of service for firefighters.	Presumptive legislation in favour of fire fighters who contract certain cancers, or the purpose of facilitating access to workers' compensation, has been enacted in several jurisdictions in Australia and internationally.	70
35	Regarding the NDIS, consideration be given to minimum benchmarks (which are pending). Regarding the NIIS, the provisions related to the seriously injured should be aligned with this Commonwealth scheme.	The Heads of Agreement between the Commonwealth and the Northern Territory Governments on the National Disability Insurance Scheme provides that the NDIS in the Northern Territory will, among other things, develop nationally-consistent minimum benchmarks for workplace accidents by 1 July 2016.	72

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
36	There should be provision in the legislation to allow for the settlement of disputed claims for compensation (whether disputed on a question of fact or law or both); and settlement of contested Applications to the Work Health Court.	Where compensability of an injury is in dispute, there is no provision in the legislation permitting a settlement and contracting to release liability.	74
37	The WRCA should provide for formal machinery enabling negotiated settlements of statutory benefits in the appropriate cases, as discussed in the Report. The legislative machinery of negotiated settlements should seek to avoid the availability of lump sums militating against effective rehabilitation. Provision should also be made for boundaries around recurrences and further claims in current employment or other employment, after the receipt of the lump sum.	There is no provision in the WRCA for the finalisation of the claim as a whole by the payment of a lump sum. However, Lump sums by commutation and Hopkins Agreements account for 30% of claims costs. This indicates a widespread demand and support for lump sums as a key tool for managing claims and has been evident for over two decades of scheme experience.	76
38	Provision to be made for the assessment of weekly payments of compensation component of lump sums in accordance with principles similar to sections 21 and 22 of PILDA.	In relation to weekly payments of compensation, lump sums for that benefit would be assessed along similar lines to sections 21 and 22 of PILDA. The calculation of future weekly compensation would be based on assumptions about the injured worker's future earning capacity; and accord with the injured worker's most likely future circumstances had the injury not occurred. An adjustment would be made to the amount of future weekly compensation by reference to the percentage possibility that the events might have occurred regardless of the injury. Future weekly compensation lump sum would be paid at discounted present values.	76
39	Provision should be made for structured settlements.	Particularly in the case of catastrophic claims, and concerns about the management of a significant lump sum, a lump sum amount can be paid by way of an annuity. PILDA refers to them as structured settlements.	77

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
40	Particularly in light of the recommendations relating to negotiated lump sums, statutory workers' compensation should remain the exclusive remedy for an injured worker for a work related injury and that the scheme maintain the abolition of the common law action by a worker against his or her employer.	Common law damages for employment-related injuries are not available in every Australian workers' compensation jurisdiction. Since the mid-1980s, all jurisdictions except the Australian Capital Territory have restricted the availability of damages at common law, and some jurisdictions have completely removed access to common law damages, for employment-related injuries.	77
41	The WRCA include an objectives clause covering return to work and rehabilitation as key objectives for the legislation, including these objects – that the Northern Territory workers' compensation scheme is fair, affordable, efficient and effective; and provides adequate and just compensation to injured workers, balanced to ensure workers' compensation costs are contained to reasonable cost levels for employers and minimise the burden on Northern Territory businesses.	Although NT WorkSafe has as one of its functions to 'further the objects of' the WRCA, there are no objects of the WRCA specified.	78
42	NT WorkSafe and the Scheme Monitoring Committee to continue examining pricing, funding ratios and scheme performance.	Stakeholders submitted that insurers should be responsible for charging adequate premium. Employers were concerned about unanticipated and significant increases in premium. Issues of pricing turn on several variables, including health and safety at the workplace and the nature and extent of compensation benefits in the event of injury.	79

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
43	There should be specific provision in the WRCA to allow for the recovery of compensation where the compensation has been paid because of a false or misleading statement or representation; has been paid because of a failure or omission to comply with a provision of the WRCA; that should not have been paid (for example, overpayments). There should be some bar to recovery where the insurer or employer has failed to calculate benefits accurately or the period over which the overpayment seeks to be made is old (for example, no recovery after 6 months has elapsed).	There is no specific provision in the legislation allow for recovery of payments made in circumstances of fraud or misleading statement or representation.	79
44	Provision to be made for weekly payments for up to 104 weeks of incapacity for older workers injured at or about the legislative retirement age. A cut off of weekly benefits once the worker reaches the age at which they are eligible for the age pension with a time limited benefit of 104 weeks if they are injured within 104 weeks of reaching retirement age or after reaching retirement age.	Most jurisdictions adopt arrangements for coverage of older workers which extend coverage for workers to the Commonwealth's pension age based arrangements; currently until age 67. Currently, if you are injured and sustain compensable incapacity, your entitlement to weekly compensation may be limited to 26 weeks.	80
45	The use of contractual indemnities, including in relation to the waiver of subrogation and the mutual indemnity irrespective of cause and notwithstanding negligence, should be reviewed.	In 2012, WorkCover WA issued a Bulletin in relation to contractual indemnities. WorkCover WA was concerned that certain contractual indemnities and mutual indemnity arrangements are not contemplated by the legislation and threaten the viability of the workers' compensation scheme. There appear to be different approaches to the handling of risk allocation in other jurisdictions and these could be examined.	83
46	The indemnity provided regarding risks 'independently of the Act' should also be reviewed.	The WRCA requires every employer to obtain a policy of insurance to cover the employers liability under the WRCA and 'for an amount of not less than the prescribed amount in respect of his or her liability independently of' the WRCA. That expression ('independently' of the Act) should be clarified.	84

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
47	The Workers' Rehabilitation and Compensation Advisory Council should review relevant parts of the Scheme annually; and the Scheme be reviewed substantively every 5 years.	Workers' compensation schemes are by their nature dynamic, complex and influenced by many factors, including several external factors (economic conditions; changes in technology; changes in industry and employment). Accordingly, a regular review of the Scheme is necessary to maintain stability and sustainability.	84
48	Changes regarding Comcare need to be monitored and the appropriate representations be made to the Commonwealth government regarding the impact on the Scheme.	In March 2014, the Commonwealth government announced that it 'introduced reform which seeks to expand access for national employers to compensation and work health and safety coverage under the Comcare Scheme'. If these proposed reforms are enacted, then the prospect of national employers currently insured in the NT moving out of the Scheme to Comcare is likely to impact on the NT premium pool and would also likely impact Scheme viability and sustainability.	85
49	NT WorkSafe work with registered training organisations to develop relevant and recognised educational pathways for careers in relation to NT workers' compensation law and practice; and examine how training can be delivered in the specialised area of workers' compensation and personal injuries claims management via relevant formal course material to assist the learning and development of case managers and others.	Training and qualified people are essential to the viability of a scheme. Competency in case management is essential to achieving the outcomes discussed in this report and in managing the Scheme generally. Training would provide case managers with a professional career path; recognition of their competency and career progression. This should in turn improve job satisfaction, assist staff retention; and address the costs of the high level of employee turnover.	86
50	NT WorkSafe review and update all penalties provisions in the legislation.	Several of the penalties set out in the WRCA have not been reviewed for a considerable period of time. For example, the penalty for breaching the confidentiality provision is 200 penalty units or imprisonment for 2 years. Contrast the penalty for not taking reasonable steps to provide suitable duties (body corporate – 25 penalty units; a natural person – 8 penalty units or imprisonment for 3 months); and the penalty for failing to report a return to work (25 penalty units or imprisonment for 6 months).	86

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
51	For the purposes of section 64, that provision should reflect weekly compensation is for the aggregate of the periods of incapacity resulting in actual loss of wages.	The date of injury may not necessarily be the start of the period of incapacity. Periods of incapacity need not be linear and could be disjointed, depending on when incapacity results in actual loss of wages.	87
52	The 'shortness of time' (for the purpose of calculating NWE) be defined to be a period of less than 4 weeks.	In calculating NWE, the expression 'shortness of time' is not defined and this could cause both delay and resulting financial hardship in benefit payment.	87
53	The WRCA allow for Northern Territory recognition of a rehabilitation provider accredited in another jurisdiction.	Vocational rehabilitation providers must be accredited by NT WorkSafe. This requirement can cause delay in provision of such services when a claimant under the WRCA requires rehabilitation services interstate. Reciprocal recognition of interstate accredited rehabilitation providers should be available for those providers seeking to practice in the NT.	88
54	Section 87 to be reviewed to introduce safeguards against delaying a decision regarding liability after a deeming of liability.	In the case the employer does not make a decision on liability regarding a new claim, liability is deemed liable. The provision which deems the employer liable, section 87, allows for a deemed liability to be removed by providing Notice; and this can be effected at any time, even months or years later.	88
55	Section 181 (which protects specified persons from certain liability) should be extended to Mediators.	Currently, Mediators appointed in accordance with section 103C(1) are not protected.	88
56	Insurers, self-insurers (including the Territory) and the Nominal Insurer should adopt an internal dispute resolution process, as developed by NT WorkSafe in consultation with those bodies.	NT WorkSafe notes that the Northern Territory Best Practice guidelines have been developed by NT WorkSafe in consultation with approved insurers and self-insurers. An important guideline is the requirement for insurers and self-insurers to have an internal dispute resolution process.	89
57	Provide ability to NT WorkSafe to issue infringement notices for breaches of the workers' compensation and insurance provisions.	It is very time and resource consuming and cost ineffective to prosecute a person for failing to meet their responsibilities under the legislation. Flexibility in enforcement options is required.	89

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RECOMMENDATION		BACKGROUND	PAGE REFERENCE
58	Uninsured employers should be required to forward claims to the Nominal Insurer as if the NI was the employer's workers' compensation insurer; and that the NI determine and manage such claims.	By permitting the Nominal Insurer ability to intervene at an earlier time, then the costs of the claim are likely to be better managed and the claimant's entitlements would be better and more quickly addressed by the Nominal Insurer.	90

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6. TERMS OF REFERENCE

1(A)
THE DEFINITION OF WORKER AND THE RELATIONSHIP WITH PAYG WITHHOLDING TAX PROVISIONS

Definition of "worker"

The submissions were in favour of a broad based definition of worker (such as the current NT "results-based" definition of worker), consistent with workers' compensation legislation in other jurisdictions[27]; and consistent with Northern Territory legislation dealing with employee benefits[28] (such as the (NT) *Annual Leave Act* and the (NT) *Construction Industry Long Service Leave and Benefits Act*).

Some felt the current NT definition of "worker", in operation since 1 July 2012, was "very clear" as to who is and who was not a worker; while others found the definition "hard for employers to understand."

The definition of "worker" is, in part, as follows:

Worker means a natural person:

a) Who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person unless:
   i. The natural person:
      A. Is paid to achieve a specified result or outcome; and
      B. Has to supply plant, and equipment or tools of trade, needed to perform the work or service; and
      C. Is, or would be, liable for the cost of rectifying any defect arising out of the work or service performed; or
   ii. A personal services business determination relating to the natural person performing the work or service is in effect under section 87-60 of the *Income Tax Assessment Act* 1997 (Cth); or

To ensure the three tests[29] in the definition are satisfied, it does appear the employer will need to have a clear arrangement in place covering the three elements (paid to achieve a specified result or outcome; supply plant and equipment or tools of traded; and is liable for the costs of rectifying any defect) in order to establish the person engaged was not a worker but an independent contractor. The particular circumstances of the case will be important and the contract or agreement will need to be certain.

[27] *Roussos, G. and Crossin, M. (2013) Preliminary Report into a review of the NT Workers Rehabilitation and Compensation Act; see Attachment 5 of the Preliminary Report' pp 1-2.*

[28] *Ibid page 23.*

[29] *"(A) is paid to achieve a specified result or outcome; and (B) has to supply plant, and equipment or tools of trade, needed to perform the work or service; and (C) is, or would be, liable for the cost of rectifying any defect arising out of the work or service performed".*

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In the 2005 decision[30] of the Industrial Court of Queensland in *Reliable Couriers*, Workcover Queensland requested premium from the employer, Reliable Couriers Pty Ltd, as Workcover considered "certain courier drivers engaged by Reliable Couriers Pty Ltd were in truth "workers" for the purposes of the Act." Workcover did not think the courier drivers were paid to "achieve a specific result or outcome." Reliable Couriers disputed this. The contract in that case stated: the "Contractor is engaged under this agreement as an independent contractor and nothing contained herein shall constitute the relationship of partnership or employer and employee between the parties hereto and it is the express intention of the parties that any such relationships are denied". While these clauses are a starting point, the Court confirmed they were not decisive.

The Court said that in order to satisfy the "is paid to achieve a specified result or outcome" test:

> *"A person's contract or quote would require him or her to complete a set task; and payment would need to be for an agreed price, based on completing the set task.*
>
> *The contract or quote should specify the result or outcome which is required. Generally, payment would not be made until the work is completed, although progress payments may be paid at agreed intervals."*

The work to be performed by couriers was "the pick-up and delivery of various freight to and from a large range of clients in Brisbane and surrounding areas". The Court found the "results or outcomes" were "not specified at the time of commencement of the engagement but become identified as the contract is performed."

Another illustration is provided by the Queensland Industrial Relations Commission decision in SPE Pty Ltd and Q-COMP[31]. Mr Fuller was a slashing and earthmoving contractor. He considered himself self-employed and conducting his own business. He charged an hourly rate and provided invoices. He was operating equipment to slash grass when he ran over a gas cylinder that exploded severely injuring him. SPE Pty Ltd argued Mr Fuller was not a worker. The Industrial Relations Commission found Mr Fuller's circumstances did not meet all three of the criteria, therefore, he was a worker for the purposes of the workers' compensation legislation.

Mr Fuller supplied the plant and equipment needed to perform the work. But, was he paid to "achieve a specified result or outcome"? And was he "liable for the costs of rectifying any defect"?

The Industrial Relations Commission took evidence from a number of witnesses about the work arrangement between Mr Fuller and SPE Pty Ltd, and analysed the factual situation over several pages of its reasons for decision.

In Mr Fuller's case, the "result or outcome was variously described by witnesses as slashing the block, clearing the block or slashing and tidying the block." The Commission was "unable to accept that SPE Pty Ltd … established on the balance of probabilities, that on 10 April 2006, Mr Fuller was "a person who is paid to achieve a specified result or outcome…. [T]he contract between Mr Fuller and SPE Pty Ltd was uncertain, to the extent that it could not be said to specify the result or outcome, or to fix that result or outcome to the ultimate total remuneration. I am also unable to accept that the contract was one under which Mr Fuller is or would be liable for the cost of rectifying any defect in the work performed."

[30] *Reliable Couriers Pty Ltd v Q-COMP [2005] QIC 51.*

[31] *SPE Pty Ltd v Q-COMP and Gary Clifford Fuller (C/2010/19).*

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Depending on how the Courts in the Northern Territory interpret and apply the "results-based test", people such as the couriers in the *Reliable Contractors* case or Mr Fuller in the *SPE Pty Ltd* case could be regarded as workers.

The ATO provides for an "employee / contractor decision tool[32]", based on "Taxation Ruling TR 2005/16 and Superannuation Guarantee Ruling SGR 2005/1 that discuss the various indicators the courts have considered in establishing if a person, engaged by another individual or entity, is an employee within the common law meaning of the term."

The Australia Taxation Office sets out an explanation[33] of when the "results test" will apply. Although many putative independent contractor arrangements involve an hourly rate, the ATO indicates that if "you are paid on an hourly basis or daily rate for the services you provide, it is unlikely you will pass the first condition of the results test as this payment would generally not be linked to producing a specific result or outcome[34]".

In 2013, Queensland moved away from the results based definition. The definition of worker in Queensland is now: "a person who works under a contract and, in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953* (Cth), schedule 1, part 2 – 5."

Under section 12-35 (payment to employee)[35] an "entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity)." The term 'employee' is not defined in the TAA. For the purposes of withholding under section 12-35, the word 'employee' has its ordinary meaning[36].

Accordingly, it appears that even under the Queensland definition ("a person who works under a contract and, in relation to the work, is an employee for the purpose of assessment for PAYG withholding"), it may not be any easier to apply, as the term "employee" is undefined and reference is provided to a lengthy Taxation Ruling.

RECOMMENDATION #1

The Northern Territory retain a broad based definition of worker. If the current results based definition of "worker" proves to be too difficult to apply, then we recommend consideration be given to the Queensland PAYG based definition of worker.

Workers' compensation claim form

NT WorkSafe submits that the legislation provides that when claiming compensation a worker must authorise the release[37] "to his or her employer and the employer's insurer of all information concerning the worker's injury or disease". The authorisation forms part of the claim form.

[32] https://www.ato.gov.au/Calculators-and-tools/Employee-or-contractor/

[33] www.ato.gov.au/General/Contractors/In-detail/Personal-services-income/Personal-services-income-for-sole-traders/?page=7

[34] www.ato.gov.au/General/Contractors/In-detail/Personal-services-income/Personal-services-income-for-sole-traders/?page=7

[35] *(Cth) Taxation Administration Act 1953 "Part 2 5—Pay as you go (PAYG) withholding" of "Schedule 1—Collection and recovery of income tax and other liabilities", subdivision 12-B (Payments for work and services) pp1-31.*

[36] *Ibid – see Taxation Ruling TR 2005/16, generally, and, in particular, paragraph 6.*

[37] *Section 82(4) WRCA.*

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For the efficient management of a claim it is often necessary for information concerning the worker's injury or disease to be provided to others besides the employer and insurer.

NT WorkSafe notes the current authorisation on the claim form includes 'medical practitioners, rehabilitation providers, investigators, legal practitioners, and other experts and consultants'. Further, it includes NT WorkSafe for the use of the information to fulfil its functions under the legislation.

RECOMMENDATION #2

Section 82(4) of the WRCA be amended to reflect the broader intent of the authorisation on the claim form.

Fishermen

Currently, "a member of the crew of a fishing vessel who is remunerated wholly or mainly by a share in the profits or gross earnings from the working of the vessel[38]" is a prescribed person who is not a worker.

Industry submissions were overwhelmingly against prescribing a member of a crew of a fishing vessel, remunerated on a share of profit basis, as a worker.

Stakeholder groups representing workers, however, wished for the crew to be deemed workers.

The industry pointed out these matters:

- Many professional fishing vessels operate in multiple fisheries jurisdictions in Queensland, Northern Territory and Western Australia.
- It would be a compliance and logistical challenge to manage the situation of a fishing vessel operating across jurisdictional waters.
- The crew members are in substance of a share fishing arrangement, evidenced by written contracts, and therefore not employees or workers as commonly understood.

The submissions or information put to us did not persuade us there was a case to change the current provision relating to share fishing arrangements.

Accordingly, we make no recommendation about changing Regulation 3A(2)(a) of the (NT) *Workers Rehabilitation and Compensation Regulations.*

Jockeys

Currently, jockeys[39] are deemed workers[40].

One stakeholder argued jockeys "as professional sports people…should not be covered under Workers' Compensation" and that a scheme should be designed specifically for jockeys.

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[38] *Northern Territory Government (2013) 'Workers Rehabilitation and Compensation Act Regulation 3A(2)(a)' P3.*

[39] *" a natural person who is authorised by a club, within the meaning of Part III of the Racing and Betting Act, to ride or drive a horse or pony for a fee or reward or provide services as a stablehand on a racecourse licensed under that Part, while the person is so engaged (whether or not on a racecourse)".*

[40] *Northern Territory Government (2013) 'Workers Rehabilitation and Compensation Act Regulation 3A(1)(b), p2.*

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The submissions or information put to us did not persuade us there was a case to change the current provision relating to jockeys.

Accordingly, we make no recommendation about changing Regulation 3A(1)(b) of the (NT) *Workers Rehabilitation and Compensation Regulations.*

Taxi drivers

Absent a provision deeming a taxi driver to be a worker, the common law position is that "the relationship between a taxi owner and the driver is one of bailment, rather than one of employment[41]".

In the Northern Territory, although taxi drivers are, nominally, deemed workers[42], as no approval has been provided under the Regulations[43], the common law position regarding taxi drivers continues to apply.

Queensland has reviewed the position in relation to taxi drivers and has created legislative mechanics for taxi service bailment agreements.

Chapter 4A of the (Qld) *Transport Operations (Passenger Transport) Act* 1994[44] sets out the requirements of a taxi service bailment agreement, which includes that it must be in writing, be signed by both parties and include the information in the regulations. This provision also regulates some other important aspects of the relationship.

Section 146B of the (Qld) *Transport Operations (Passenger Transport) Regulation* 2005[45] sets out a list of matters that need to be included in the bailment agreement, including the percentage of the takings; who pays for fuel; that the driver contributes to the cost of premiums for insurance; and other provisions specifically related to insurance.

In consultation with the taxi industry, Regulation 3A(1)(c) of the (NT) Workers Rehabilitation and Compensation Regulations could be revised towards a suitable arrangement regarding taxi drivers.

RECOMMENDATION #3

Taxi drivers not party to bailment agreements to be recognised under the definition of worker (in a similar way to the relevant Queensland provisions).

[41] *Commissioner of Taxation of the Commonwealth of Australia v De Luxe Red And Yellow Cabs Co-operative (Trading) Society Ltd and Ors [1998] FCA 361.*

[42] *Northern Territory Government (2013) 'Workers Rehabilitation and Compensation Act Regulation 3A(1)(c) (a natural person who is engaged to drive a taxi, private hire car, limousine or motor omnibus, within the meaning of the Commercial Passenger (Road) Transport Act, by a person who, or by a director of a body corporate that: (i) is accredited within the meaning of that Act or is exempted under section 15 of that Act; and (ii) is approved by the Authority for this regulation, while the person is so engaged)' pp2-3.*

[43] *There are no persons who, or directors of a body corporate that, accredited within the meaning of Commercial Passenger (Road) Transport Act (or exempted under section 15 of that Act) that are approved by NT WorkSafe.*

[44] *https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/T/TranstOpPasTA94.pdf*

[45] *https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/T/TranstOpPasTR05.pdf*

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1(B)

ACHIEVING THE OBJECTIVES OF PROVIDING AN EQUITABLE AND COST-EFFECTIVE COMPENSATION SYSTEM, WITH A PARTICULAR EMPHASIS ON THE IMPROVED REHABILITATION OF INJURED WORKERS AND RETURN TO WORK

Employer excess

Presently, employers self-insure via the excess period of 1 day[46]. Employers have indicated a willingness for flexibility in managing claims directly, and for the opportunity to control the cost of premium. Improved and early employer buy-in to injury management will assist in improving return to work rates.

Currently, the data and information does not permit for drawing conclusions regarding the cost savings to employers of increasing the excess period.

Accordingly, although we make no recommendation about increasing the excess period, we believe this issue should remain on the agenda of the WRCAC for future implementation.

Alternative Employer Incentive Scheme

Where an employer "is unable to provide the worker with suitable employment …the employer must refer the worker to an alternative employer incentive scheme developed by" NT WorkSafe[47].

The host employer "is liable to compensate the injured worker for any aggravation, acceleration or exacerbation of the injury that occurs within one year after the worker commences employment with" the host employer[48].

The AEIS[49] provides the following:

- Weekly benefits continue to be paid by the original employer for up to a twelve week training/placement period (no payment is made by the host employer).
- If after the initial training/placement period, the host employer provides employment, then that host employer will be eligible for an incentive payment. This is only payable after the completion of twelve weeks of paid employment (ie. This period is in addition to the training period). The amount paid will be 45% of average weekly earnings (AWE), or 50% of the wage payable for that employment, whichever is the lesser. The incentive payment will be made to the host employer as a lump sum after the completion of the 12 week paid employment period.
- Further incentives may be payable to the host employer for up to 12 months, from the commencement date of the initial 12 week incentive period. Such further incentives will be as negotiated between the host employer and the original employers' insurer.

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[46] *Section 56, WRCA.*

[47] *Section 75A(2), WRCA.*

[48] *Section 75A(3), WRCA.*

[49] *NT Worksafe Bulletin http://www.worksafe.nt.gov.au/Bulletins/HealthAndSafetyTopics/Workers%20Compensation/13.02.08.pdf*

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- The incentive payments are made on the understanding that the host employer will offer ongoing employment after the completion of the placement period/s.

When the AEIS was introduced, the Minister said:

> *"The clear intention is to assist long-term injured workers to find alternative employment when, for many reasons, these workers are unable to return to their pre-injury employment.*
>
> *The mechanics of this alternative employer incentive scheme provide for the placement of long-term injured workers with another employer for job placement and training periods of up to one year, while indemnifying the new employer against any aggravations to the existing injury.*
>
> *This alternative employer incentive scheme sits particularly well with the employer group for the Northern Territory since most employers are small businesses that employ fewer than 10 workers. For these employers, it is often particularly difficult to provide their injured worker with alternative and suitable duties."*

Stakeholders thought the AEIS should be retained and better promoted with more options provided in relation to the incentives to host employers. We believe the AEIS is a sound initiative with widespread support.

There is potential to improve on the sophistication of the AEIS. The AEIS can:

- Be included among the range of employment initiatives of the NT Department of Business.
- Assist address labour shortages by employers' identifying the need for employees and design programs for injured people with a commitment to employment.
- Be encouraged by approved insurers canvassing their premium payers to provide opportunities for placement of injured workers under the AEIS.

RECOMMENDATION #4

We recommend:

- *The AEIS be retained and NT WorkSafe promote the AEIS to stakeholders, in particular insurers and rehabilitation providers.*
- *NT WorkSafe further promote the AEIS through the Department of Business networks.*
- *Insurers provide premium incentives including discounts to employers, particularly small employers, if an employer supports an injured worker under the AEIS.*

Employer and worker accountability in rehabilitation

When the legislation commenced on 1 January 1987, a key objective of the *Work Health Act* (as the WRCA was known at the time) included promoting "…the rehabilitation and maximum recovery from incapacity of injured workers…".

Beyond financial compensation, the Scheme deals with rehabilitation and return to work. Judicial support for this goes back more than 20 years[50].

[50] *There is "a heavy emphasis on the rehabilitation of injured workers, not merely on providing a scheme for mere monetary compensation" Justice Mildren, Maddalozzo and Ors v Maddick, (1993) 84 NTR 24; [1992] NTSC 46.*

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Employers have a duty to take all reasonable steps to provide injured workers with suitable employment[51]; and, so far as is practicable, participate in efforts to retrain the injured worker[52]. Workers have a duty to undertake reasonable rehabilitation treatment or participate in rehabilitation training, or as appropriate in workplace based return to work programs; or, as required by the employer to present themselves at reasonable intervals to a person for assessment of their employment prospects[53].

These obligations are illustrated in the following Northern Territory cases of *Northern Cement Pty Ltd v Ioasa*[54] and *Robert Knight v Normandy Mining Limited*[55]. In *Ioasa*, Chief Justice Martin explained the relative obligations this way:

> *"In respect of the quantification of loss of earning capacity, it is up to the employer to point to evidence in the case minimising his liability in monetary terms. It would be unreasonable to require the worker 'to prove an open ended negative', such as that he was not capable of earning more than an amount which he chooses to rely upon. Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequences of such findings rests with the employer. The powers available to the employer under the Act, such as in s 75B, in relation to treatment, training, rehabilitation and assessment of a worker, and the penalty upon a worker who unreasonably fails to undertake the same as provided in subs(2) of s 75B, work together to ensure that an employer is not disadvantaged when it comes to showing the earning capacity of the injured worker."*

In *Knight*, the Work Health Court expressed this view: the legislation "is designed to properly compensate injured workers, not enrich or support them when they choose not to work. The Act clearly intends to compensate them on the basis of what they could earn in the most profitable employment reasonably available to them. Thus it could be said there is an underlying assumption that there is an obligation on the worker to seek such employment."

Although the obligations on the employer and employee in sections 75A and 75B of the WRCA are clear, simple and explained by the Courts, there is strong support for greater employer and worker accountability and involvement in rehabilitation and return to work.

The rehabilitation model basically involves return to work to:

- The same job, same employer.
- Modified job, same employer.
- A different job, same employer.
- Same / modified job, different employer.
- A different job, different employer.

The easiest rehabilitation would be a return to work to the same workplace in some capacity.

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[51] *Section 75A(1)(a), WRCA.*

[52] *Section 75A(1)(b), WRCA.*

[53] *Section 75B(1), WRCA.*

[54] *Northern Cement Pty Ltd v Ioasa [1994] NTSC 58.*

[55] *Robert Knight v Normandy Mining Limited (2000) NTMC 002.*

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In other jurisdictions, to encourage this, there is a requirement on employers to keep an injured worker's job available for a defined period of time. Whilst there is merit in this idea, practically, it would be challenging to implement this across the board in the Northern Territory on a one size fits all basis. Our population and size of business is too small and spread over wide distances.

It is better, at this stage of our economic development, to look at other means to achieve the same objective. For example, NT WorkSafe could have programs to:

- Better communicate return to work options and the benefits for the employer and employee.
- Increase the understanding of return to work options for everyone.
- Provide further and better information regarding injury management.
- Encourage the appointment of return to work coordinators (particularly for the larger employers).
- Encourage early and prompt formulation of injury management or return to work plans.

RECOMMENDATION #5

NT WorkSafe develop programs and information about the benefits to industry of return to work options; injury management; and early and prompt formulation of injury management or return to work plans.

Definition of rehabilitation

Associated with the above, we found through stakeholder feedback there was a need to better understand what rehabilitation means. As noted, although that should be fairly clear from a reading of sections 75A and 75B, practically, and at the grass roots level, there was some degree of uncertainty about whose role it was to take proactive steps; particularly, to what extent the (i) employer and (ii) injured employee had to contribute to the rehabilitation effort.

Section 75(2) of the WRCA defines "rehabilitation" as "the process necessary to ensure, as far as is practicable, having regard to community standards from time to time, that an injured worker is restored to the same physical, economic and social condition in which the worker was before suffering the relevant injury." In relation to "community standards", discussion about that can be found at pages 28 and 29 of the Preliminary Report.

It appears the definition of rehabilitation, and the application of community standards, is heavily laden with policy issues. It would be preferable for these concepts to be simply and clearly stated.

We may be better served with a definition of rehabilitation that is intuitive and clearly understood.

For example, section 40 of the (Qld) *Workers' Compensation and Rehabilitation Act* provides for a comprehensive definition of rehabilitation:

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Meaning of rehabilitation

1) Rehabilitation, of a worker, is a process designed to

   a) Ensure the worker's earliest possible return to work; or

   b) Maximise the worker's independent functioning.

2) Rehabilitation includes

   a) Necessary and reasonable

      i. Suitable duties programs; or

      ii. Services provided by a registered person; or

      iii. Services approved by an insurer; or

   b) The provision of necessary and reasonable aids or equipment to the worker.

3) The purpose of *rehabilitation* is

   a) To return the worker to the worker's pre-injury duties; or

   b) If it is not feasible to return the worker to the worker's pre-injury duties—to return the worker, either temporarily or permanently, to other suitable duties with the worker's pre-injury employer; or

   c) If paragraph (b) is not feasible—to return the worker, either temporarily or permanently, to other suitable duties with another employer; or

   d) If paragraphs (a), (b) and (c) are not feasible—to maximise the worker's independent functioning.

Regulation 109 of the (Qld) Workers' Compensation and Rehabilitation Regulations provides further:

1) Rehabilitation must be goal directed with timely and appropriate service provision having regard to

   a) The worker's injury; and

   b) The objectives of the rehabilitation and return to work plan; and

   c) The worker's rate of recovery.

2) Strategies used in rehabilitation must be evaluated as the case progresses to monitor their effectiveness.

3) The worker's employer must ensure rehabilitation for a worker is coordinated with and understood by line managers, supervisors and co-workers.

4) A worker must be treated with appropriate respect and equity.

We think sections 75A and 75B can be assisted by reforming the definition of "rehabilitation" in a way similar to section 40 and regulation 109 of the Queensland legislation.

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RECOMMENDATION #6

We recommend reforming the definition of "rehabilitation" along the lines of section 40 and regulation 109 of the Queensland legislation.

Return to work programs

Here, too, stakeholders expressed a need for clear meaning and definition of the intent of return to work programs and who bears what responsibility.

Again, the obligations are clear, however, there was some uncertainty about the nature and extent of each party's responsibility. As discussed above, here, too, people thought there was insufficient requirement on employees to do more for themselves in returning to work. According to one stakeholder, there is "limited guidance as to the undertaking of return to work programmes for injured workers."

The retraining obligation on employers is provided by section 75A of the WRCA. The terms "rehabilitation training" and "workplace based return to work program" in section 75B are not defined.

There was stakeholder support for better definitions so that workers and employers understand their obligations around training and return to work programs and plans. Consideration should be given to providing guidance material around these phrases. For example:

- Where a worker is required to participate in rehabilitation training or, as appropriate, in workplace based return to work programs, the program should take into account the individual's circumstances, nature and extent of disability, education, qualifications and age.
- Rehabilitation providers should identify and select the appropriate rehabilitation steps and work though the strategies until durable return to work is achieved.
- In relation to rehabilitation training and return to work programs, the NT has a large number of workers on a FIFO arrangement. Accordingly, geographical location would be a relevant consideration and opportunities that may be available in other parts of Australia for workers that were originally based or resident elsewhere.

We agree the WRCA provisions should make clear that each of the employer and employee (i) are required to cooperate; and (ii) has a positive duty to work towards a return to work.

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RECOMMENDATION #7

We recommend defining "workplace based return to work program" similar to that the definition of "workplace rehabilitation plan" proposed by Hanks[56] as including:

"the provision of appropriate services which are aimed at maintaining the employee in, or returning them to, suitable employment. Those services include:

- *a) Initial rehabilitation assessment.*
- *b) Functional assessment.*
- *c) Workplace assessment.*
- *d) Job analysis.*
- *e) Advice concerning job modification.*
- *f) Occupational rehabilitation counselling.*
- *g) Vocational assessment.*
- *h) Advice or assistance concerning job seeking.*
- *i) Vocational re-education and training.*
- *j) Advice or assistance in arranging vocational re-education and training.*
- *k) Advice or assistance in return to work planning.*
- *l) The provision of aids, appliances, apparatus or other material likely to facilitate the return to work of a worker after an injury.*
- *m) Modification to a work station or equipment used by a worker that is likely to facilitate the return to work of the worker after the injury.*
- *n) Opportunities that may be available interstate for workers that were originally based interstate.*
- *o) Any other service.*

Suitable employment

Whilst an employer is required to assist an injured work with "suitable employment"[57], that expression is not defined. In the situation confronting micro and small businesses in the NT, employment in alternative duties may not be easily achieved.

Suitable employment is understood to mean work to which a worker is currently suited with regard to the worker's capacity, age, education, skills and work experience.

The WRCA sets out factors[58] in assessing the "most profitable employment":

a) His or her age.

b) His or her experience, training and other existing skills.

c) His or her potential for rehabilitation training.

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[56] Hanks, P. and Hawke, A. (2012) 'A review of the Safety Rehabilitation and Compensation Act 1988-Issues paper' Paragraph 6.81' p75.

[57] Section 75A(1)(a), (NT) Workers Rehabilitation and Compensation Act.

[58] Section 68, (NT) Workers Rehabilitation and Compensation Act.

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d) His or her language skills.

e) In respect of the period referred to in section 65(2)(b)(i) – the potential availability of such employment.

f) The impairments suffered by the worker.

g) Any other relevant factor.

The "most profitable employment available" also includes self-employment[59]; and employment "in a geographical location (including a place outside the Territory) away from the place where the worker normally resides where it would be reasonable to expect the worker to take up that employment and the person liable to pay compensation to the worker has undertaken to meet the reasonable expenses in moving him or her and his or her dependants to that location and other reasonable relocation expenses[60]."

RECOMMENDATION #8

We recommend "suitable employment" could be defined to include the employee's:

a) Age.

b) Experience, training and other existing skills.

c) Potential for rehabilitation training.

d) Language skills.

e) The impairments suffered by the worker.

f) Self-employment.

g) Where employment is available in a place that would require the employee to change her or his place of residence—where it is reasonable to expect the employee to change her or his place of residence and the employer undertakes to meet the reasonable expenses in moving him or her and his or her dependants to that location and other reasonable relocation expenses.

h) Any other relevant matter.

The 104-week rule

Section 65(2) of the WRCA states:

"For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:

a) His or her normal weekly earnings indexed in accordance with subsection (3).

b) The amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:

   i. In respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self employment), if any, reasonably available to him or her.

[59] *Section 65(5)(a), WRCA.*

[60] *Section 65(5)(b), WRCA.*

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ii. In respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, **whether or not such employment is available** to him or her

and having regard to the matters referred to in section 68". **(emphasis added)**

Section 65(2)(b)(ii) has become known as the "104-week rule". The amendment in relation to "whether or not such employment is available to him or her" was made by the *Work Health Amendment Act* (No. 2) 2002, and commenced on 1 November 2002.

In the Second Reading Speech, the Minister said:

> *"The bill will provide for a stronger ability to deem injured workers to have an earning capacity after 104 weeks of incapacity. This will have the potential to reduce future long term scheme costs by enabling the possible reduction or cancellation of benefits in accordance with the claimant's reasonable capacity to earn. Currently, a long term partially incapacitated worker can remain on total incapacity benefits if, because of the condition of the labour market, suitable employment is not readily available. Provision will only apply after 104 weeks of incapacity. It will not effect current long term claimants, nor those in the future who, because of the seriousness of their injury, will have little or no real ability to return to the workforce."*

We think the intent behind the 104-week rule and its utility could be promoted by adding some machinery around it to aid in its implementation. This machinery can be achieved by adding a formal notice procedure to the evaluation of the "most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her."

A formal written notice with adequate information from the employer to the worker not only provides for transparency in that the process of review is disclosed to the worker; but the worker is consulted and afforded the opportunity to add relevant information and participate in the process. A notice also removes the element of surprise (that often accompanies a notice issued under section 69 of the WRCA).

The employer would be required to give the worker written notice of the review under section 65(2)(b)(ii):

- Informing the worker of the proposed review.
- Setting out information addressing (i) any plan or document prepared as part of the RTW process; (ii) any occupational rehabilitation services that are or have been provided for the worker; (iii) the employment the employer contends the worker has a capacity to perform and why; (iv) the criteria in section 68; and (v) setting out the information on which the employer relies.
- Consulting the worker in relation to this information by inviting the worker to make written representation on the subject of the review within a reasonable time specified in the notice.

This process would enable the worker to understand the deeming of an earning capacity, even where the worker is not actually in paid employment; and provide the worker with opportunity of being consulted and to provide relevant information. The burden would remain on the employer to source the evidence that proves the earning capacity.

RECOMMENDATION #9

We recommend a formal notice procedure requiring the employer to give the worker written notice of the review, setting out relevant information.

Rehabilitation costs for counselling

Counselling is specifically mentioned only once in the legislation, and that relates to financial counselling supporting application for the commutation of weekly payments[61].

There was support for access to broader counselling and at an earlier stage, including in relation to a worker's family. This counselling support does not necessarily incur considerable expense, however, is beneficial to the wellbeing of the worker and his or her family.

As one stakeholder put it: we "agree with counselling for those involved in the injury and recovery process. Long-term injuries can have significant effects on the injured worker and family. Having this supported in legislation provides insurers, RTW Coordinators and Rehabilitation providers with extra support to encourage action by the injured worker to attend when the warning signs and unusual behaviours are noticed."

As was noted in *Psychology, Personal Injury and Rehabilitation*[62] (2004), regarding psychological treatment, sympathetic "and positive care, which pays attention to patients beliefs and questions, is sufficient for most accident victims. Those who are more distressed, or who report complications shortly after an accident, require further help….Non-specific counselling may have little impact and may even be harmful. More precisely formulated types of counselling may be effective with specific problems."

RECOMMENDATION #10

We recommend the provision for the payment of reasonable expenses for family counselling; financial counselling; and employment counselling.

Guidelines for the treatment of common injuries

There was support for the development of guidelines referring to the information developed in other Australian jurisdictions and internationally, in relation to the treatment of common injuries.

RECOMMENDATION #11

We recommend NT WorkSafe liaise with other jurisdictions, the AMA and other key stakeholders to adopt as appropriate guidelines developed for the treatment of common work injuries.

Medical treatment and costs

Save for the requirement that medical costs be "reasonably" incurred, the WRCA makes no provision for the regulation of the cost of medical, surgical and rehabilitation treatment[63] and hospital treatment[64].

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[61] Section 74(1)(b)(iv), WRCA.

[62] International Underwriting Association of London and the Association of British Insurers. The IUA/ABI Rehabilitation Working Party (2004) 'Psychology, Personal Injury and Rehabilitation' p 35.

[63] Northern Territory Government (2013) 'Workers Rehabilitation and Compensation Act-Definition of "medical, surgical and rehabilitation treatment" in section 49, pp21-22.

[64] See definition of "hospital treatment" in section 49, WRCA.

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There was general support for a guide to determine an appropriate amount for medical, surgical and rehabilitation treatment and hospital treatment.

RECOMMENDATION #12

We recommend NT WorkSafe develop guidelines based on the schedule of fees recommended by health professional organisations such as the AMA and the Australian Psychological Society. Care should be taken that rates do not result in reduced access to treatment across the NT.

Clinical Framework

The Clinical Framework for the Delivery of Health Services[65] is an evidence-based policy framework that outlines a set of five guiding principles for the delivery of allied health services to injured employees. It reflects a bio-psycho-social approach to the treatment of injured employees.

As noted in the Preliminary Report[66], the Clinical Framework has 5 principles: measure and demonstrate the effectiveness of treatment; adopt a bio-psychosocial approach; empower the injured person to manage their injury; implement goals focused on optimising function, participation and return to work; base treatment on the best available research evidence.

NT WorkSafe has already afforded the opportunity to insurers to use the Clinical Framework in consultation with treatment providers. There was support from stakeholders for the adoption of the Clinical Framework.

RECOMMENDATION #13

We recommend NT WorkSafe continue work in relation to the adoption of the Clinical Framework in the Scheme.

Medical certificates

A key function of medical certificates is to describe the diagnosis, cause and nature and extent of incapacity including restrictions; and to guide workers and employers in relation to injury management and return to work.

The current Northern Territory medical certificate[67], is titled “Workers Compensation Medical Certificate” and provides for relevant details, including a section titled “Fitness for Work” and “Injury Management.” The NT WorkSafe “Guide for Doctors[68]” in part states:

> *“When issuing a medical certificate for a worker’s incapacity, you should consider the worker’s capacity for modified or alternative work.*
>
> *You should not automatically certify an injured worker as totally unfit for work. As soon as the worker’s health permits you should certify an injured worker as partially fit, that is, fit for suitable duties for a specified period.”*

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[65] http://www.vwa.vic.gov.au/forms-and-publications/forms-and-publications/clinical-framework-for-the-delivery-of-health-services

[66] Roussos, G. and Crossin, M. (2013) Preliminary Report into review of the NT Workers Rehabilitation and Compensation Act’, p40.

[67] http://www.worksafe.nt.gov.au/Forms/Rehabilitation%20%20Compensation/FM19111.pdf

[68] http://www.worksafe.nt.gov.au/Publications/Guides/doctors_guide.pdf

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We recognise the limited functionality of a medical certificate as a stand-alone document. As one medical doctor noted, medical certificates "are not useful from a treatment rehabilitation or RTW point of view. They advise the insurer of progress in broadest terms…An agreed treatment and rehabilitation plan with realistic time frame is a separate issue."

A rehabilitation provider articulated the following: a "focus on work capacity in preference to incapacity in respect of medical certificates forces medical examiners to think about the worker's return to work and existing capabilities. The negative phrasing of the concept of incapacity allows a medical practitioner to treat and manage a worker in the "now" rather than thinking of what is necessary in the "future" to promote effective and timely return to work."

In United Kingdom, in the context of the UK social security system, the sick note has been re-phrased as the "Statement of Fitness for Work[69]". The "fit note" comes with a comprehensive range of information[70] for doctors, employees, employers, rehabilitation providers.

There was broad support for medical certificates to be meaningful and productive of their purpose.

RECOMMENDATION #14

Medical certificates should be revised to focus on the worker's capacity, rather than incapacity; and import from the Clinical Framework, and the UK fit note the appropriate matters that should be reported on. There is no reason the medical certificate should not be titled the "Statement of Fitness for Work."

Permanent impairment

Typically, workers' compensation schemes provide for a threshold for access to the lump sum for permanent impairment. These thresholds levels vary considerably throughout Australia. The threshold in the NT is 5% whole of person impaired[71]. The assessment of impairment on a whole of person basis relies on AMA4[72].

The use of the AMA guides across both the NT and many other jurisdictions has occurred for close to two decades. Jurisdictions use AMA guides or variants as part of their permanent impairment assessment processes which include the establishment of panels of doctors that translate AMA guides into local guides.

The use of AMA Guides is supported as suitable in terms of assessing a workers' impairment rather than presenting a scalable measure of a workers' incapacity.

There is some concern expressed by the same experts that the AMA guides appear to discriminate against blue collar workers in their use as a measure of incapacity.

The Northern Territory has used AMA4 for the assessment of PI for injured workers for most of the past decade. There are aspects of AMA4, including its lack of treatment for psychological/psycho-social injuries that require further consideration as is the case in relation to later editions of the AMA Guides.

[69] https://www.gov.uk/government/publications/fit-note-guidance-for-gps

[70] https://www.gov.uk/government/collections/fit-note

[71] *Section 70, (NT) Workers Rehabilitation and Compensation Act.*

[72] *Regulation 9, (NT) Workers Rehabilitation and Compensation Regulations.*

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A multi-jurisdictional project led by Safe Work Australia's Permanent Impairment Temporary Advisory Group has examined optimal arrangements for the assessment of PI in Australia. The assessment of AMA5 has been undertaken and it is proposed 'in principle' that a nationally uniform approach to PI assessment adopting AMA5 with supporting infrastructure for assessors is popular with all jurisdictions excluding Victoria.

It is also noted that the NT may not be able to fully implement all aspects of the proposed AMA5 because of resource implications and a reliance on visiting specialist doctors.

NT WorkSafe could develop processes around approval of medical practitioners for that purpose with the qualification that the practitioner be formally trained in the use of a slightly modified and proscribed AMA5. There is presently no such requirement.

In Safe Work Australia's *Optimal Assessment Arrangements for Permanent Impairment Discussion Paper* of March 2013, the following recommendations were made:

- Use AMA 5 as amended by the NSW guides.
- Replace the Mental and Behavioural Disorders chapter in AMA 5 and adopt the *Psychiatric Impairment Rating Scale* (PIRS)system for rating psychiatric impairment.
- The Visual System chapter in AMA 4 replace the equivalent chapter in AMA 5.

RECOMMENDATION #15

We recommend that, consistent with the nationally harmonised approach to permanent impairment assessment, that the Northern Territory adopts AMA5 with modifications as proposed by NT WorkSafe and advised by Safe Work Australia. Assessor accreditation and training if practicable.

Provisional liability

In the case of a decision to defer the consideration of liability, and as noted in the Preliminary Report[73], there is a requirement on the employer to make weekly payments of compensation[74], and, in the case of claims for mental stress, engage in rehabilitation[75]. However, it is not clear that medical expenses may, provisionally, also be paid.

It is noted that medical costs could be potentially very large (for example, emergency evacuation interstate). Requiring the provisional payment of medical costs as well, may present a disincentive for insurers to use the deferral option. Placing a dollar limit may also be problematical in deciding which treatments or part treatments to pay for.

As NT WorkSafe suggests, a solution may be that medical and rehabilitation costs payable should only be those costs that arise from treatment provided during the period of the deferral. Interstate evacuations and indeed hospital inpatients and emergency surgery would, in most cases, have taken place before any decision to defer was made, and therefore would not be payable. To minimise the likelihood of such large costs being incurred during the period of a deferral, hospital inpatient and associated surgical costs as well as interstate evacuations cost should be excluded.

[73] *Section 85(1)(b), WRCA.*

[74] *Section 85(4)(b), WRCA.*

[75] *Section 85(4)(c), WRCA.*

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RECOMMENDATION #16

We recommend section 85 of the WRCA be clarified to confirm that where the employer defers liability, in addition to making payments of weekly compensation, an employer should also meet the reasonable costs for medical and rehabilitation costs on the basis discussed above. The nature and extent of the liability for medical expenses should be defined.

Those payments would be made on a 'without prejudice' basis[76].

The legislation provides that, in the event the employer is not liable for the claim, those payments cannot be recovered[77]. Stakeholders submitted that there should be provision for the recovery of those payments in some circumstances, particularly where the worker acted dishonestly.

RECOMMENDATION #17

There should be a right of recovery where an injured employee has acted dishonestly; the claim is fraudulent; or an injured employee has obstructed or delayed the determination of the claim, and liability is subsequently determined not to exist.

Insurer and employer toolkit

The statutory benefits set out in legislation are, essentially, the minimum sums due to a claimant. The employer or insurer can provide assistance, incentives and benefits over and above the level set out in the legislation.

More than 10 years ago, Justice Mildren of the NT Supreme Court in Simpson's case[78] said: "..that there is nothing in the Act which prevents an insurer or employer making a payment to a worker which is in addition to any strict entitlement the worker may have under the Act. Such a payment may not be a payment of compensation under the Act at all, or it may be payment in respect of compensation but for a larger amount than the worker is entitled. Whilst insurers and employers are not noted for their generosity, if they wish to be generous, I can see nothing in the Act – except perhaps s 74(3) – which prevents this from occurring so long as s 186A is not breached".

Even though any employer or insurer can make payments to or for the worker over and above the minimums set out in the legislation, we believe some structure around this would encourage innovation in claims service delivery.

We think employers and their insurers should be provided with specific tools to deliver on innovation in service delivery, claims management and return to work.

In particular, we believe claims management can be improved for the benefit of worker and employer with legislation supporting the formulation of individual budgets; and financial help towards remunerative activity.

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[76] *Section 85(7)(a), WRCA.*

[77] *Section 85(7)(d), WRCA.*

[78] *Normandy Woodcutters Ltd & Anor v Simpson [2002] NTSC 43.*

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In relation to individual budgets, these would be useful in relation to long term claims involving serious injury. Here, case managers would have the option of negotiating, for example, an annual budget covering weekly payments of compensation; and medical, surgical, retraining and rehabilitation costs. The injured worker would then be able to manage their own affairs unimpeded by someone else's direction about what is and what is not best for the injured worker. The budget would not only outline the employer's and injured worker's shared commitment to a constructive and cooperative relationship, but it would give the worker choice and provide a budget to enable the worker to deal directly with his or her needs. Importantly, the ability to make independent decisions about the events and activities in his or her life would provide for the dignity of the individual.

Aside of making available a sum of money, individual budgets could contemplate several matters, such as developing new skills, including education; finding suitable employment or undertaking retraining, including any workplace modification; mobility in the community, including travelling and going on holidays and for any additional costs for carers related to travel; and household services. Prescribing matters would be useful, however, as much discretion should be afforded the parties to be able to tailor an arrangement specific to the situation and circumstances at hand.

In relation to self-employment, this is already contemplated by the WRCA. However, as with several other initiatives already in the legislation, this is not something well understood and or implemented. As with other initiatives discussed earlier in this Report, here, too, we think some structure around the idea of self-employment should assist an employer and employee use this tool. The employer and insurer toolkit in relation to self-employment could include provision of business related training, such as for business management or particular technical expertise.

The Commonwealth Department of Veterans Affairs provides some guidance[79]. A rehabilitation plan for a worker considering self-employment may include referral to a Small Business Advisory Centre; attendance at a 'Starting Your Own Business' workshop; a business plan prepared by a suitably experienced Accountant or Business Planner; small business management training; and mentoring, lodgement of an incorporation of a business and an application for allocation of an ABN.

RECOMMENDATION #18

We recommend consideration be given to providing legislative tools for the:

(a) Development of individual (periodic) budgets for workers suffering permanent or long term incapacity.

(b) Assistance for those considering self-employment.

Death claims

In the event of the death of a worker, currently the benefits payable are the lesser of the cost of the funeral or 10% of the annual equivalent of AWE (ie 10 % x $1,449.30 x 52 weeks = $7,536.36) whichever is the lesser; a lump sum of 260 x AWE (ie 260 x $1,449.30 = $376,818); and a weekly payment of 10% of AWE to prescribed children.

[79] *Safe Work Australia (2012) 'Comparison of Workers Compensation Arrangements in Australia and New Zealand March 2011', pp251.*

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Other jurisdictions are more generous[80]. NSW pays a lump sum of $498,950; Victoria, $555,350; Queensland, $554,750; plus $14,825 for a totally dependent spouse plus $29,640 for each dependant family member other than the spouse, under 16 or a student.

We think the amount payable for the funeral and the amount lump sum amount paid to dependents should be revised. We also think that the death benefits should include counselling for the family.

RECOMMENDATION #19

We recommend the:

- *Amount for the cost of the funeral increase to the cost of the funeral or 20% of the annual equivalent of AWE, whichever is the lesser.*
- *The lump sum payment provided in section 62(b) increase to 364 times AWE at the time the payment is made.*

We also recommend counselling for family members to a maximum of 5% of the annual equivalent of AWE.

Recurrences and reactivation of claims

The WRCA does not provide for a mechanism to deal with a recurrence of a compensable injury following the closure of a claim. It would seem that if a recurrence is linked to a compensable medical condition, it would also be compensable.

One stakeholder described the problem this way: the "cost to business to manage a claim that is a recurrence is costly and time consuming, as information is not always easy to obtain…".

Given the absence of formal mechanisms to deal with recurrence claims, the ICA notes employers and insurers will vary in approach. Stakeholders have submitted that a mechanism should be introduced to allow for recurrences to be managed.

One stakeholder observed the issue is "one of how a recurrent claim is assessed considering the existence of a previously accepted claim, how that claim arising from the original injury is financially quantified, and what effect the existence of an arrangement such as a Hopkins arrangement … may have in the determination….Considering the complexity of this issue, retaining the current practice may be the preferred option."

NT WorkSafe points out insurers close claims when it appears that there are no more benefits to be paid. However, in some cases there is a need to reactivate a claim. Currently there is no legislated mechanism to reactivate a claim and in particular no time limits imposed on employers/insurers when requested by a worker to pay further benefits once a claim has been closed.

RECOMMENDATION #20

We recommend NT WorkSafe carry out a review of this issue and determine whether to place eligibility criteria around recurrences and whether to place time limits. In particular, that the legislation includes a process and time limits for the reopening or reactivating of existing claims.

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[80] *Safe Work Australia (2014) Comparison of workers' compensation arrangements in Australia and New Zealand; refer Annexure 4, table 4.4, Death entitlements, Comparison of workers' compensation arrangements in Australia and New Zealand'pp1-225.*

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Fraud

The ICA refers to fraud and penalties in the WRCA and suggests these provisions should be reviewed generally.

Section 90 of the WRCA provides for a fine of 25 penalty units or imprisonment for 6 months for failing to "immediately notify" the employer when a worker has returned "to work with an employer … or his or her employment or other circumstances change in such a way as is likely to affect his or her entitlement to, or the amount of, compensation". Currently, the value of a penalty unit is $144.00[81]. Accordingly, the fine under section 90 is a maximum of $3,600.

One stakeholder described the situation as follows: penalties "for fraud are minimal under the legislation but fail to act as a sufficient fraud deterrent. Specific reference to fraud with the legislation and the ability for the court to impose penalties on injured workers that are meaningful and reflective of the seriousness of the matter are necessary within the legislation".

The WRCA is also absent specific provision for fraud or misleading information provided by anyone, including worker and employer.

There is stakeholder support for measures to address fraud and to review penalties.

One jurisdiction that provides a useful example of dealing with this issue is Queensland[82]. The Queensland provisions cover defrauding, or attempting to defraud an insurer; and the accuracy of statements or documents given to a range of people, including the Regulator.

Particular acts, such as not informing an insurer of engaging in work, are deemed to have defrauded an insurer. There are also provisions relating to a duty to report fraud; and the entitlement to compensation if convicted of fraud.

RECOMMENDATION #21

We recommend consideration be made to adopting provisions similar to sections 533 – 537[83], (Qld) Workers Compensation and Rehabilitation Act; and allow for infringement notices as an alternative to prosecution.

Mental Stress claims

The definition of "injury" in section 3 of the WRCA, excludes "an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment."

[81] *Regulation 2, Penalty Units Regulations.*

[82] *(Qld) Workers Compensation and Rehabilitation Act, Sections 533-537*
http://www.austlii.edu.au/au/legis/qld/consol_act/wcara2003400/

[83] *Refer Annexure 3, sections 533 – 537, (Qld) Workers Compensation and Rehabilitation Act.*

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Not surprisingly, this broad formulation of the defence of "reasonable administrative action" has been interpreted in a way that limits its utility. As the law currently stands, where there are multiple stressors, the exclusions must apply to all of them for liability to be avoided[84].

Annexure 5 sets out section 40 of the (Vic) *Workplace Injury Rehabilitation and Compensation Act* 2013. Section 40(1) of that legislation refers to "management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer." Section 40(7) provides an extensive list of matters that may be regarded "management action".

RECOMMENDATION #22

We recommend the WRCA be amended to replace the current formulation[85] with "management action" using section 40 of the (Vic) Workplace Injury Rehabilitation and Compensation Act 2013 as a model.

Disease claims

One stakeholder submitted, it "is considered necessary to amend the definition of an "injury" under the Act to make it contemporary with other state based legislations, and require an injury to be caused in a significant or substantial degree by the worker's employment, not merely coincidental to them being at work. The current provisions allow for injuries such as stroke and heart attack to be covered under the definition of an injury, which in our view is not the intention of the legislation, unless work has contributed in a significant degree to such injuries. Introducing a stronger employment connection test by amending the definition to "arising out of and in course of employment", or maintain the current definition and introduce a test that employment is the substantial contributing factor to injuries and diseases would alleviate this issue".

In relation to disease claims, in the Northern Territory, employment is required to be "the real, proximate or effective cause[86]" of "the worker's contraction of the disease or to its aggravation, acceleration or exacerbation[87]".

Even though we have a legal requirement that employment be "the" real, proximate or effective cause of a disease, strokes and heart attacks involving rupturing or frank injury to arteries, for example, can be considered frank injuries, or injuries simpliciter, and therefore compensable without need to prove employment was the real cause.

Some Australian jurisdictions have specifically excluded heart attack injuries and stroke injuries, unless employment was the significant or substantial contributing factor.

[84] *Rivard v NTA (1999) 129 NTR 1.*

[85] *"reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment".*

[86] *Section 4(8), WRCA.*

[87] *Section 4(6A), WRCA.*

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Referring to Annexure 3, sections 40(2) and 40(3) (Vic) *Workplace Injury Rehabilitation and Compensation Act* 2013 express the position this way:

2) There is no entitlement to compensation in respect of a heart attack injury or stroke injury that arises in the course of, or that was caused by, a disease, unless the worker's employment was a significant contributing factor to the injury or to the disease.

3) There is no entitlement to compensation in respect of the following injuries unless the worker's employment was a significant contributing factor to the injury:

   a) A heart attack injury or stroke injury to which subsection (2) does not apply.

   b) A disease contracted by a worker in the course of the worker's employment (whether at, or away from, the place of employment).

   c) A recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.

As noted in the Preliminary Report[88], Hanks also recommended “all incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, aneurisms, spinal disc ruptures caused by degenerative diseases and similar phenomena)” be subject to a significant contribution test.

We agree that ordinary diseases of life such as stroke injuries and heart attack injuries should not be compensated unless work was the cause.

RECOMMENDATION #23

We recommend the WRCA should be amended so that ordinary diseases of life are not compensated; and incidents that are a manifestation of an underlying disease (such as heart attacks and strokes caused by degenerative disease and similar phenomena) will be covered for workers' compensation purposes on the same basis as a “disease”— that is, where employment was the real (or dominant), proximate or effective cause of the incident.

[88] *Roussos, G. and Crossin, M. (2013) Preliminary Report into review of the NT Workers Rehabilitation and Compensation Act' p 51.*

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1(C)
WEEKLY AND OTHER ENTITLEMENTS TO COMPENSATION

1(D)
THE ASSESSMENT AND LEVEL OF INCOME MAINTENANCE

Normal Weekly Earnings

The calculation of NWE is of key importance. Employer payment declarations are completed, and premiums are calculated, on the basis of NWE. Weekly compensation is paid on the basis of NWE. Accordingly, it is important for people to be clear on the calculation of NWE.

The workers' compensation insurance policy provides[89] that the "first and every subsequent premium that may be accepted shall be regulated by the amount of wages, salaries and all other forms of remuneration paid or allowed to workers during each period of indemnity."

When you turn to the NWE provisions in the WRCA, the definition refers to "remuneration[90]" or "gross remuneration[91]".

Although the WRCA refers to "remuneration" through the legislation, including Schedule 2, save for the following instances of clarification, the term "remuneration" is not defined:

- Remuneration does not include superannuation contributions made by the employer[92].
- Remuneration includes "an over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance (where shift work is worked in accordance with a regular and established pattern) and service grant, but does not include any other allowance[93]".
- Shift work[94] and overtime[95] are taken into account, as are non-cash benefits[96] (accommodation, meals and electricity).

An appropriate and simple statement of principle to assist understanding "remuneration" can be found in the Northern Territory Supreme Court's decision in *AAT King's Tours v Hughes*[97] the "intention appears to be, to provide to the worker during disability amounts by way of compensation calculated by reference to the normal weekly earnings which he would have countered upon receiving if there had been no disability".

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[89] *Schedule 2 (Employers Indemnity Policy), WRCA.*

[90] *Section 49, WRCA.*

[91] *Section 49, definition NWE, subparagraphs (b) and (c), WRCA.*

[92] *Section 49(1A), WRCA.*

[93] *Section 49(2), WRCA.*

[94] *Section 49(3), WRCA.*

[95] *Section 49(3), WRCA.*

[96] *Section 49(4), WRCA.*

[97] *AAT King's Tours v Hughes (1994) 99 NTR 33.*

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NT WorkSafe Bulletin[98], “Employers Guide to Workers’ Compensation”, provides this information about calculating NWE:

> *“The following is a brief explanation of what is included in the calculation of NWE. However the insurer will assist in calculating the worker’s entitlement.*
>
> *NWE are a worker’s normal number of hours per week, at their normal hourly rate. NWE also includes:*
>
> - *Overtime where the overtime was worked in a regular and established pattern.*
> - *Shift allowance where worked in a regular and established pattern.*
> - *Over award payments.*
> - *Climate allowance.*
> - *District allowance.*
> - *Leading hand allowance.*
> - *Qualification allowance.*
> - *Service grant.*
>
> *But does not include any other allowance. Benefits allowed in a form other than an amount of money paid or credited for meals, accommodation or electricity, may also form part of NWE and should be advised to the insurer.”*

Subparagraph (d) of the definition of NWE in section 49 of the WRCA describes what you do in the event it is impracticable to calculate NWE[99]:

- Due to the shortness of time.
- Where the worker is “remunerated in whole or in part other than by reference to the number of hours worked”.

In which case NWE is calculated as “the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment.”

Many employment arrangements involve remuneration “in whole or in part” assessed “other than by reference to the number of hours worked”. For example, salary packages involving components, including bonuses and performance pay. If that is the situation, then to determine NWE, you average the gross weekly remuneration earned by the worker during the prior 12 months in paid employment (or if working for less than 12 months, the average of that period).

Stakeholders have submitted this method of calculating NWE is difficult and time consuming as it requires the insurer to obtain records from all other employers the worker may have been engaged with during the previous 12 months; and while this calculation may be appropriate for reason of shortness of time, there appears to be no good reason why it should be mandated simply because the worker is paid, in whole or in part otherwise that in accordance with an hourly rate (eg, production rate, piece rate, non-cash benefit). This could be simplified by averaging the worker’s remuneration with only the relevant employer for up to 12 months of weeks of paid employment.

[98] http://www.worksafe.nt.gov.au/Bulletins/Bulletins/13.01.16b.pdf

[99] By applying paragraphs (a) (normal hours by the ordinary time rate of pay); (b) (two or more contracts of employment, part time in one full time in the other); or (c) (two or more contracts of employment, all part time) of the definition of NWE.

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Generally, stakeholders have expressed difficulty in understanding and calculating NWE in accordance with sub paragraphs (a), (b), (c) or (d) of the definition of NWE. There is merit in this concern. These are some of the questions that need to be considered in calculating NWE:

- What were the terms of the contract of employment?
- When did the worker first receive a workers' compensation benefit?
- What were the worker's normal weekly number of hours of work?
- What was the worker's ordinary time rate of pay?
- Was overtime worked in accordance with a regular and established pattern? How many hours of overtime, on average, was worked each week? At what rate of pay?
- Was shift work, worked in accordance with a regular and established pattern? How many hours of shift work, on average, was worked each week? At what rate of pay?
- Were any of the following (or similar) paid to the worker - an over-award payment; climate allowance; district allowance; leading hand allowance; qualification allowance; shift allowance; service grant?
- Was the worker paid by reference to hours worked?
- Was the worker paid per day?
- Did the worker receive commission?
- Did the worker receive non-monetary benefits such as accommodation, meals and electricity?

Given the array of employment arrangements and different industrial instruments and conditions, and as can be seen above, it is frequently a challenging task identifying when a worker is remunerated in part of or in whole other than on the basis of hours worked, and, if so, the items (and amount) of non-cash benefits that should be included in NWE.

We believe it would be productive to better define NWE to assist the prompt and accurate declaration of wages and payment of weekly compensation; and prevent the risk of understatement of remuneration for the purpose of premium calculation and NWE in paying weekly compensation.

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RECOMMENDATION #24

We recommend a consolidation of the definition of NWE, along the lines of an example suggested by Hanks[100]; that the average remuneration of an employee before an injury is taken to be the average amount paid to the employee where remuneration includes, but is not limited to:

- *Wages and/or salary.*
- *Any regular and required overtime.*
- *Allowances that relate to a skill the employee has or a service the employee provides.*
- *Any earnings from other employment the employee undertakes in addition to her or his work with the employer, if: a full-time employee can demonstrate permission from their employer (if required) to engage in outside employment; and an employee (either full time or part time) can demonstrate the additional employment was regular—that is, they were engaged in additional employment for at least six weeks in the 13 weeks before injury.*
- *Remuneration does not include allowances paid in relation to expenses incurred.*

Non-cash benefits

The three categories of 'non-cash' benefits now recognised[101] by the WRCA are accommodation; meals; and electricity.

The basis of valuation of these items is not spelled out in the legislation. The ICA submits that there should be certainty as to the value ascribed to non-cash benefits. We agree with this submission.

RECOMMENDATION #25

We recommend non-cash benefits be assessed at the actual value of those benefits, or $500 per week whichever is the lesser.

The ICA further submits that the value of accommodation should not be included in the calculation of NWE for FIFO workers. The ICA reports that insurers "have experienced an increase in frequency of [claims for non-cash benefits] following the increase in economic activity in the NT largely associated with oil, gas and mining developments…".

Particularly in relation to FIFO workers, the ICA submits "that such benefits not be available to those workers who are maintaining their own place of residence" as "this could lead to the worker receiving greater compensation than their actual loss."

An example is provided of a "worker performing work on a mine site (with accommodation provided) is incapacitated for work and returns home to their residence. The value of the non-cash benefit (accommodation) is assessed at $300 per week gross. This value is added to the worker's Normal Weekly Earnings (NWE) and the worker receives an additional $300 per week whilst residing in their own home."

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[100] Hanks, P. and Hawke, A. (2012) 'A review of the Safety Rehabilitation and Compensation Act 1988-Issues paper' , paragraph 7.34' p97.

[101] Section 49(4), WRCA.

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The Northern Territory Court of Appeal examined a FIFO arrangement in *HWE Contracting Pty Ltd v Young and Newmont Australia Limited v Kastelein*[102]. Those workers' compensation claims raised "for consideration the treatment under the [WRCA] of the value of residential accommodation provided to injured workers who were "fly in/fly out" employees at a mine situated in a remote part of the Northern Territory[103]".

In the *Young* and *Kastelein* case, Justice Riley described the circumstances of each worker as follows:

- "Both workers were employed at the Tanami Granites Mine which is situated in the Tanami Desert some 650 kilometres north-west of Alice Springs. It is a location described as being "very isolated"."
- "Both were required to work for a period of 14 days (working 12-hour shifts) and then had seven days off."
- "They were employed on a fly in/fly out basis and obliged to reside at the accommodation village at the mine where they were provided with accommodation and meals at no cost to themselves."
- "The workers had no choice other than to reside in the village. The mining site was remote and no other accommodation was available."
- "Each of the workers maintained residential accommodation elsewhere for periods when they were not engaged in their employment at the mine."

This FIFO situation is not unusual and common in many of the Northern Territory's resource projects.

In the *Young* and *Kastelein* case, it was argued that "accommodation at the fly in/fly out remote area workplace (1) made no net difference to the workers' financial position, and (2) was a duplication of the workers' own residences elsewhere. Therefore, the assessed value of accommodation should not be treated as 'remuneration' for the purposes of determining 'normal weekly earnings' in a statutory compensation scheme which has 'income maintenance' as its object".

The NT Court of Appeal, however, determined[104] that the value of residential accommodation provided to the … workers was remuneration for the purposes of assessing normal weekly earnings." Justice Riley stated:

> *"During the period the worker was at the village he did not have to provide accommodation for himself elsewhere. What accommodation he obtained when he was absent from the village on his days off was a matter for himself. He may have stayed temporarily in hostels or with others or he may have stayed in his own home. However, having been injured and consequently being obliged to be accommodated at a location away from the village, the worker had no choice other than to obtain permanent accommodation for himself. He lost the net benefit of the accommodation previously provided to him free of charge."*

In the case of FIFO workers, it is contended the value of accommodation, electricity and meals (provided during their swing), should not be included in the calculation of NWE.

[102] *[2007] NTSC 42.*

[103] *Op cit Justice Riley, paragraph 24.*

[104] *Op cit Justice Riley, paragraph 43.*

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Noting the reasoning of Justice Riley in *Young* and *Kastelein;* and the point made in relation to FIFO workers by the ICA, in the case of injured workers on a FIFO arrangement who return to their residence after injury, we believe it relevant to examine further the issue of the appropriateness of paying a non-cash benefit in those circumstances. Matters to take into account would include:

a) The level of cash remuneration.

b) The nature of the FIFO arrangement.

c) The nature, type and value of packages afforded to FIFO workers and any relevant differences in remuneration packages across geographical locations and type of industry.

d) The alternative accommodation available to a worker (whether they stayed temporarily in hostels or with others or in their own home).

Maximum weekly benefit rate

Many claims for compensation involve no time lost; and, of those claims that result in incapacity, mostly, there is a return to work within a few weeks.

For the first 26 weeks of incapacity, we agree NWE would be paid at the worker's pre-injury level, as calculated in accordance with the definition of NWE.

However, for long term[105] incapacity, we believe there should be an upper limit regarding NWE. As a matter of policy, this is already recognised in the Northern Territory in relation to common law claims[106]. It would not be unreasonable to expect that people who can earn two or three times NT average weekly earnings privately protect any amount above a defined reasonable cap via other insurance.

Purcal and Wong note and argue that one "of the most common factors affecting claims management is the level of remuneration. Fortin and Lanoie (1998), Krueger (1990) and Biddle and Roberts (2003) find that workers are more inclined to make a claim and increase the duration of their claiming period when there are increases in benefit generosity[107] …. This relationship is supported by Lu, Oswalt and Shields (1999) who find that when the benefit level is reduced with the implementation of deductibles, the frequency and cost of claims fall[108]".

It should be noted that there is, in any event, an overall cap on the weekly benefit for long term incapacity of 75% of NWE or 150% of AWE, whichever is the lesser[109].

RECOMMENDATION #26

We recommend that after 26 weeks of incapacity, a workers' NWE should be capped at 250% of AWE.

[105] *Incapacity beyond 26 weeks.*

[106] *Section 20, (NT) Personal Injuries (Liabilities and Damages) Act.*

[107] *Purcel, S and Wong, A. (2013) 'Australian Workers' Compensation: A Review; October 2007- Inquiry into the Operation of Queensland's Workers' Compensation Scheme Report No. 28 Finance and Administration Committee' p11.*

[108] *Ibid p12.*

[109] *Section 65(1B), WRCA.*

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Step down

During the first 26 weeks of incapacity, a worker is entitled to 100% of NWE less only amounts "actually earned[110]".

For long term incapacity, the WRCA provides for one step down to 75% of loss of earning capacity (or 90% for low income earners). The current step down is shown in the following table:

Day 1 – 26 weeks	100% NWE
26 – 104 weeks	75% LOEC[111]
104 weeks – age 65 / 67	75% LOEC (whether or not employment is available)[112]

Step downs are said to provide an incentive for employees to return to work as quickly as possible.

Step downs also take into account any savings that an injured employee makes by virtue of not attending work, such as not paying for travel costs or child care.

What is the position in other jurisdictions? This is illustrated in Annexure 6 titled "Comparison duration of claims and step downs". Victoria and NSW have steps downs at 13 weeks; and at 130 weeks. Tasmania reflects the NT position of a step down at 26 weeks. Queensland also has step down at 26 weeks; and 104 weeks.

As noted above, of the claims that result in incapacity, mostly, there is a return to work within a few weeks and a small proportion continue beyond 26 weeks.

Whilst we make no recommendation regarding changing the current step down provision of the WRCA, we believe there could be an improvement in implementation of the current step down at 26 weeks of incapacity by requiring the employer to provide formal notice to the worker of the approaching step down.

RECOMMENDATION #27

We recommend that formal notice be provided to the worker of the pending step down; and the step down not to take effect until 14 days after the worker has been notified.

Duration of weekly payments

Currently, naturally depending on the qualifying factors such as incapacity, weekly payments continue to retirement, for all claims. No provision is made to distinguish the seriously injured from the less seriously injured.

[110] Section S64(1), WRCA.

[111] This is an overall cap on the weekly benefit for long term incapacity of 75% of NWE or 150% of AWE, whichever is the lesser.

[112] This is an overall cap on the weekly benefit for long term incapacity of 75% of NWE or 150% of AWE, whichever is the lesser.

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The HWCA recommended a duration limit of five years (260 weeks) for incapacity benefits; and continuing to retirement for serious injury. Clayton described the HWCA's recommendation as follows[113]:

> *"The HWCA report, in terms of a benefits proposal, recommended a common benefit structure for the first five years in terms of essentially full income replacement for 13 weeks (including a five-day employer excess) with a step-down to 70 percent income replacement (capped at 150 percent of the jurisdiction's average weekly earnings) from week 14 until five years. After five years, the no fault option was for the week 14 to five years provisions to continue until age of retirement or earlier return to work, together with the payment of medical and like benefits. However these ongoing arrangements were restricted to workers who could demonstrate an impairment of at least 30 percent. As well, benefits for non-economic losses were to be capped at $100,000. The common law option, after five years, had no continuing entitlement to either loss of earnings or medical and like benefits and was subject to a requirement to surmount a 30 percent impairment threshold. Those who could achieve this threshold requirement and successfully demonstrate fault could be entitled to uncapped damages for economic loss and a maximum of $200,000 for non-economic loss."*

What are the duration caps in relation to weekly payments and medical expenses in other jurisdictions? These are set out in Annexure 6.

Recognising other jurisdictions cap benefits through duration or whole person impairment assessment, and noting evidence suggests that over 92% of injured workers return to work within 12 weeks of injury, with an additional 4% return to work within 52 weeks, we believe the benefit structure in our Scheme should be revised to reflect not only our current practice in the Territory but also the contemporary practice in Australia.

The consensus around Australia is to limit the duration of weekly payments and the duration of medical costs. We think that it is appropriate for the Northern Territory to reflect the policy of the large Australian jurisdictions. We believe the HWCA recommendation of a duration limit of 260 weeks (five years) should be adopted, save for serious injury. Instead of a 30% impairment of the whole person, we believe a rating of 15% or more of the whole person on the appropriate AMA Guides should indicate serious injury. The assessment of impairment should be limited to the primary injury and exclude secondary injury, such as functional overlay.

In relation to medical and rehabilitation benefits, similarly having regard to other large Australian jurisdictions, we believe there should be a duration limit of 52 weeks after the cessation of weekly payments.

To assist illustrate the above, the proposed benefit structure and duration of weekly compensation and medical costs is set out Annexure 7.

RECOMMENDATION #28

We recommend:

- *A separate category for serious injury. SI defined as WPI 15% or greater. SI to be paid weekly benefits to retirement age; plus all medical and care services for life. The assessment of impairment should be limited to the primary injury and exclude secondary injury, such as functional overlay.*
- *All other claims – income maintenance ceases at the 5 year point (260 weeks) ; and medical and related services will end after the entitlement to income maintenance has ceased for 12 months.*
- *In relation to medical and rehabilitation benefits, there should be a duration limit of 52 weeks after the cessation of weekly payments.*

[113] *Clayton, A. (2007) 'Review of the Tasmanian Workers Compensation System Report September 2007' p 35.*

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1(E)
PORTABILITY OF BENEFITS OUTSIDE OF THE JURISDICTION

Currently, compensation can be claimed by injured workers who reside overseas, albeit in limited circumstances; namely, compensation ceases after 104 weeks[114], subject to an extension of 104 weeks in certain circumstances[115]; throughout, at least quarterly, the worker must give the employer a declaration[116] in the approved form; and the employer must be satisfied about the worker's continued incapacity[117].

The basic argument against paying compensation while someone is outside of Australia is provided by Hanks[118]: "the prospect of effective assessment of an employee's continuing incapacity for work, of the amount that the employee is able to earn in suitable employment and of the efficacy of medical treatment is very much diminished if the employee is outside Australia; and there can be no real participation in an effective rehabilitation program while the employee is outside Australia".

Whilst everyone would acknowledge that is the case, we note over 1 million Australian's live overseas[119]. We also note that regarding overseas workers working in Australia via a Visa arrangement, to ban compensation should they return home after an injury would encourage greater use of Visa labour.

Given that portability of benefits outside Australia was re-introduced to the Scheme recently[120], time should be provided for the evidence of the costs to the Scheme of this provision to emerge. Accordingly, we think it is appropriate to make no recommendation about winding back the current portability arrangement. However, the impact on the cost to the scheme should continue to be reviewed.

[114] *Section 65B(3), WRCA.*

[115] *Section 65B(4), WRCA.*

[116] *Regulation 6A, (NT) Workers Rehabilitation and Compensation Regulations.*

[117] *Section 65B(2)(b), WRCA.*

[118] *Hanks, P. and Hawke, A. (2012) 'A review of the Safety Rehabilitation and Compensation Act 1988-Issues paper 7.230 and 7.231' p123.*

[119] *Australians Abroad: Preliminary findings on the Australian Diaspora - See more at: http://advance.org/australians-abroad-preliminary-findings-on-the-australian-diaspora/*

[120] *In 2012.*

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1(F)
JOURNEY CLAIMS

Whilst noting the arguments of some stakeholders that employers have little control over employee related activity and journeys, to, from and in the course of the working day, little evidence has been advanced during the review about the impact of journey claims upon scheme viability, beyond some once off high-cost settlements.

Journey claims are not a feature of schemes in Victoria, Tasmania and South Australia.

Journey claims remain a feature of schemes in New Zealand, Queensland, Commonwealth Seacare and Defence Veterans Affairs schemes, the Australian Capital Territory and the Northern Territory schemes.

It should be noted that in some schemes (NSW, Tasmania, Queensland, the Northern Territory and Comcare) some exceptions and exemptions allow journey claims in limited circumstances for some categories of employees and involve injuries that occur during breaks both on and offsite.

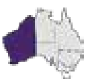
In the NT it is also evident that Compulsory Third Party / Motor Accidents (Compensation) insurance covers motor vehicle related journey injury claim benefits and expenses.

The NSW journey claims arrangements provide some exceptions for:

- Bush firefighters and emergency service volunteers.
- Workers injured while working in or around a coal mine.
- People with a dust disease claim under the *Workers' Compensation (Dust Diseases) Act* 1942 — Clauses 4, 25 and 26, Part 19H, Schedule 6, 1987 Act.

And also provides guidance in this area for workers with injuries received on or after 19 June 2012 where there must be a real and substantial connection between employment and the accident or incident out of which the personal injury arose — s10 1987 Act and Clause 18, Part 19H, Schedule 6, 1987 Act.

The Northern Territory already excludes journey accidents arising out of the use of a motor vehicle[121]. A jurisdictional comparison is provided below:

						
ACT	**QLD**	**NSW**	**SA**	**TAS**	**VIC**	**WA**
Yes	Yes – some restrictions – s 35	Limited – injuries after 19 June 2012 must be a real and substantial connection	Limited – only where there is a real and substantial connection	No – some exceptions – s 25(6)	No	No

[121] Section 4(2A) WRCA.

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Further examination of this matter, including a cost/benefit analysis of the evidence in relation to the impact of journey claims and their cost impact upon the NT scheme's viability is required. At this stage, and in the absence of such assessments as suggested, a small number of very costly settlements and divided scheme design in some jurisdictions around this matter, we are not entirely convinced at this time that non-vehicular journey claims should not remain as part of the WRAC Act.

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1(G)
DISPUTE RESOLUTION AND A FRAMEWORK TO RESOLVE DISPUTES QUICKLY, FAIRLY AND AT A LOW COST

Dispute resolution process and Mediation

Compulsory mediation was introduced into the WRCA almost 15 years ago. ADR under the WRCA is provided for in sections 103A to 103K, of Part 6A (Dispute Resolution).

The mediation provisions were aimed at reducing the time taken to deal with disputes. This was to be achieved by providing for the early disclosure of information by the parties; requiring the parties to clarify and consider issues in dispute; and provide an opportunity to settle the dispute.

Legal representation

Mediation is compulsory, lawyers are not normally allowed and the mediation must be held and dealt with promptly. The mediation is confidential and anything said cannot be later admitted in Court[122].

Stakeholders supported ADR under the WRCA. Most of the issues raised by stakeholders concerned the right to legal representation, disclosure of information, and process.

In relation to legal representation, "a party is not entitled to legal representation in the mediation[123]" unless the Mediator agrees because "it is physically impracticable for the party to participate in the mediation in person[124]; or it would otherwise facilitate the conduct of the mediation[125]." Stakeholders supported parties being represented at Mediations as of right.

Workers are often in a position of disadvantage in the mediation as they do not have access to advice and support. The mediator is not in a position to give this advice or support to any party.

As well-known workers' compensation expert, Emeritus Professor Rob Guthrie explained it: "insurers are "repeat players" in the system. Workers on the other hand are usually "one-shotters" who have little or infrequent contact with the system. The frequency with which a participant has contact with a system is indicative of their knowledge of that system and also to some extent reflects the resources they can apply to resolution of disputes in that arena."

The preponderance of the submissions supported the parties being legally represented, particularly legal representation for the claimant. It is accepted that parties, particularly workers, should have access to adequate representation, especially when dealing with complicated issues of fact and law.

RECOMMENDATION #29

We recommend that Alternative Dispute Resolution (currently Mediation) under the WRCA allow for parties to engage legal representation and not be limited to the discretion of the mediator.

[122] *Section 103K(1), WRCA.*

[123] *Section 103F(2), WRCA.*

[124] *Section 103F(3)(a), WRCA.*

[125] *Section 103F(3)(b), WRCA.*

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Payment for legal advice

Currently, the parties must bear their own costs of the Mediation[126].

To facilitate the obtaining of advice by workers, there should be some provision to assist with legal costs.

We think it reasonable for employers / insurers to pay an amount approved by NT WorkSafe (eg $1,500) for workers to seek legal advice including to ensure the worker is clear about the process; assist the worker to prepare for mediation and support the worker throughout the mediation process and the conference; and ensure the worker understands the outcome of the mediation and the next steps should they choose to take them.

RECOMMENDATION #30

We think this idea has merit and we would support NT WorkSafe approving a fee (eg $1,500) for workers to obtain legal advice of and incidental to the Mediation.

Disclosure of information and protocols

In relation to the disclosure of information, the Mediator has power to request specified materials in the party's possession or control[127], and do any other things that are necessary or convenient to be done for the purpose of resolving the dispute[128]. NT WorkSafe is required to request of each party to provide all written medical reports in the party's possession or control relevant to the dispute (including reports on which the party does not rely)[129]; and all other written materials in the party's possession or control on which the party relies[130].

These requirements are consistent with the philosophy of early disclosure of information promoting early resolution of disputes and reduction of overall costs. The ICA also submitted that “the early mandatory exchange of relevant material is important to ensure the success of pre-litigation procedures and encourages early resolution of claims. Effective sanctions for both parties are a means of ensuring this”.

Accordingly, should the matter reach the Work Health Court, there are potential sanctions on a party that has not approached the Mediation meaningfully.

Should the matter reach the Work Health Court, there are potential sanctions on a party that has not approached the Mediation meaningfully.

Rule 23.50 of the Work Health Court Rules titled “failure to provide correct information to mediator” gives the Court discretion to “make a costs order against the party who failed to provide the mediator with relevant information” where:

[126] *Ibid ‘Section 103G’ p75.*

[127] *Section 103C(3)(c)’ p73.*

[128] *Section 103C(3)(e)’p73.*

[129] *(NT) Workers’ Rehabilitation and Compensation Act, s103D(2A)(a).*

[130] *Section 103D(2A)(b)’ p74.*

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- A worker or employer provides information to the Court that differs from the information listed in the Mediation Certificate.
- The Court is satisfied that the worker or employer failed to provide the mediator with relevant information that was in existence at the time of the mediation to which the certificate relates.

Anecdotally, issues continue to arise as to the nature and extent of the disclosure of documents. There is even uncertainty about the process. A stakeholder described the concern as follows: there "needs to be more information provided at Mediation about the process that follows if there is no resolution. I did not realise I need to provide all the supporting reports and evidence when I filed the application and have to do so in person".

We think that the overall process, including disclosure of information, can be assisted by adopting a similar protocol to Northern Territory Supreme Court Practice Direction 6[131].

Borrowing from the Chief Justice's Explanatory Document for Practice Direction No. 6 of 2009 (Trial Civil Procedure Reforms) – all parties are to be under a general obligation to disclose the nature of their respective cases and to attempt to settle the dispute prior to commencing litigation.

Currently, given the contracting out provision in the WRCA, there is no clear machinery to settle a claim for compensation or to make an offer "without prejudice save as to costs". Reforms to the ADR process coupled with recommendations elsewhere in this report regarding the payment of lump sums should address this issue and enable parties to make offers of settlement.

Practice Direction 6 provides for these objectives – to:

- Encourage the exchange of early and full information about a prospective legal claim.
- Enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings.
- Support the efficient management of proceedings where litigation cannot be avoided.

The process would involve:

- The worker writing to give details of the claim.
- The employer acknowledging the claim letter promptly.
- The employer giving within a reasonable time a detailed written response.
- Parties conducting in good faith genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.

The parties are required to disclose documents relevant to the issue; information on which they rely; and/ or for the purpose of promoting the resolution of the dispute (and no other purpose). Failure to adequately comply has costs consequences (see paragraph 13 of Practice Direction 6).

[131] *Refer to Annexure 8.*

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RECOMMENDATION #31

We recommend the mediation provisions be enhanced by the creation of protocols similar to Practice Direction 6 modified to maintain as little formality and technicality, and with as much expedition, as the requirements of the WRCA and a proper consideration of the matter permits.

Judicial review

Civil litigation is very expensive and time-consuming. Ideally, the Northern Territory would establish its own Administrative Tribunal to deal with workers' compensation claims, among other claims, at lesser cost.

On 27 August 2013, the Northern Territory Attorney General announced that the Attorney-General ordered a Report into the creation of a centralised Administrative Appeals Tribunal.

On 15 May 2014, the Northern Territory Attorney General announced[132] the introduction of the Northern Territory Civil and Administrative Tribunal (NTCAT), "a one-stop-shop for civil and administrative appeals". The NTCAT Bill is expected to be debated in Parliament during the August 2014 Sittings.

RECOMMENDATION #32

We recommend NT WorkSafe have input into the development of the NT CAT with a view to further considering the merit of transferring the adjudication of disputes under the WRCA to the NT CAT.

[132] http://newsroom.nt.gov.au/mediaRelease/9395

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1(H)
THE OCCUPATIONAL DISEASES COVERED BY DEEMING PROVISIONS

Schedule 1 list of diseases

The WRCA sets out at Schedule 1 a list of diseases that are deemed to arise out of employment[133]. Schedule 1 has not been revised for a considerable period of time.

Safe Work Australia has commenced a "Deemed Diseases Project" with the objective of developing "an up-to-date Australian list of deemed diseases based on the most recent scientific evidence on the causal link between disorders and occupational exposure". In its Communique of 15 August 2013[134], Safe Work Australia referred to work it is undertaking to develop an up to date Australian list of deemed diseases; and a "final report including the list of scheduled diseases and supporting guidance material will be presented to Members by August 2014".

At its meeting of 3 April 2014, Safe Work Australia's Communique[135] noted "progress on workers' compensation activities in the areas of permanent impairment assessment, deemed diseases and the 2014 National Return to Work Survey". We understand a final report is to be prepared in late 2014.

RECOMMENDATION #33

We recommend NT WorkSafe continue its work with Safe Work Australia and consider revising Schedule 1 of the WRCA after the results of Safe Work Australia's deemed diseases work are available.

Presumptive legislation for firefighters

Presumptive legislation[136] in favour of fire fighters who contract certain cancers[137], for the purpose of facilitating access to workers' compensation, have been enacted in several jurisdictions in Australia and internationally. Fire fighters experience work-related exposure to materials and risks that cause cancers, Cancers are causally linked to the release of carcinogens from building materials in structural fires (such as benzene, chloroform, styrene, and formaldehyde) which can be absorbed through the skin or be inhaled.

The evidence and adoption of legislation to cover firefighters both internationally and within Australia is substantial.

Extensive submissions from United Voice and the Fire Brigade Employee's Union of NSW, as well as the legislative practices in this area have demonstrated the need to extend presumptive legislation in the NT to cover firefighters.

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[133] *(NT) Workers' Rehabilitation and Compensation Act, section 4(6).*

[134] *http://www.safeworkaustralia.gov.au/sites/swa/media-events/media-releases/pages/mr20130816*

[135] *http://www.safeworkaustralia.gov.au/sites/swa/media-events/media-releases/pages/mr0042013*

[136] *Western Australia Government (2013) 'Workers' Compensation Injury Management Bill No 4 to An Act to amend the Workers' Compensation and Injury Management Act 1981' pp 1-9.*

[137] *Ibid pp1-9.*

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Such legislation is also supported by other Unions, the NT Working Women's Centre, NT Police Association, the Australian Council of Trade Unions, Unions NT, Australian Manufacturing Workers Unions, the Maritime Union of Australia, the Community and Public Sector Union and the Australian Nursing and Midwifery Federation.

Other jurisdictions both internationally (United States: New York, Philadelphia, Washington, Canada: Alberta, British Columbia, Saskatchewan, NW Territories, Yukon, N. Brunswick, Europe: France, Stockholm, Germany) and within Australia (Commonwealth, West Australia, Australian Capital Territory and South Australia) have adopted similar presumptive legislation and provisions for firefighters. A similar Bill is proposed by Greens Party representatives in the Victorian Legislative Council.

The Australian jurisdictions have also adopted qualified arrangements for part time and volunteer (Tasmania) firefighters based upon verification of participation in fighting fires and proposed duration of volunteer firefighting activity. Some other Australian jurisdictions are in the process of adopting similar presumptive legislation for fire fighters.

It should be noted that (i) presumptive legislation for fire fighters does not cover infectious diseases, heart related diseases, lung, skin or liver cancers and (ii) it has been advocated by some during the review that similar arrangements may need to be advanced in the future for police and emergency services workers who may also be exposed to similar or identical risks in the course of their employment.

Regarding the date of injury, the presumption established by the proposed legislative change will only apply where the date of injury is on or after a date to be determined. The date of injury is defined as either the day on which the worker is first diagnosed by a medical practitioner as having contracted the disease or the day on which the worker becomes totally or partially incapacitated whichever is the earlier. In most situations, the date of injury is likely to be the date of diagnosis.

The criteria for the proposed presumptive legislation to apply to firefighters needs to be established and might include application to workers who are a member or officer of a permanent fire brigade in circumstances where firefighting duties made up a substantial portion of the worker's duties and the worker:

- Contracts one of the 12 specified cancers.
- Is employed as a firefighter at the time of the injury.
- Was employed as a firefighter for at least the qualifying period for the applicable cancer (qualifying periods range from 5-25 years).
- Was exposed to the hazards of a fire scene in the course of employment.

Part time fire fighters may not be captured by some legislation by virtue of the requirement to have firefighting duties "make up a substantial portion of their duties''. Retained and auxiliary (as well as casual, part time and some full time firefighters) do not fight fires as their primary employment. However they are still exposed to the same carcinogens from structural fires as full time permanent fire fighters.

Some other Australian jurisdictions are also in the process of adopting similar legislation.

It should also be noted that the Commonwealth legislation in this area appears incomplete as it has failed to acknowledge asbestos and liver related disease exposure risks for firefighters. These risks should be included within a revised WRCA schedule of diseases.

We support the establishment of either amendments to the definition of injury in the WRCA or new legislation that removes legal barriers for career firefighters (full time, part time and volunteers) claiming workers' compensation entitlements who contract one of 12 specified cancers (refer table below).

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If amended in the terms proposed, the WRCA would provide that employment is taken to have been the dominant cause of the contraction of the disease for firefighters with reference to the 12 cancers described in the table below.

The legislation, which should be backdated for application to firefighters, should provide for a rebuttable presumption in favour of firefighters and shift the burden of proof regarding the cause of the cancer from the cancer sufferer to their employer or the employer's insurer.

It will still be open to the employer or insurer to rebut the presumption if it can be proven by them that the firefighter contracted the cancer in some other way.

The proposed amendments do not affect the compensation entitlements of firefighters under the current WRCA.

The presumption established by the proposed Act is in response to various scientific studies which indicate an increased risk to career firefighters of contracting certain cancers from their accumulated exposure to carcinogens in the course of fighting structural and chemical fires.

Workers' compensation laws require that a worker's employment must be a significant contributing factor to the contraction of a disease in order to claim workers' compensation entitlements.

In relation to firefighters who contract cancer the requirement to prove an occupational link between exposure to carcinogens through firefighting duties and the relevant cancer is difficult.

Twelve types of primary site cancer are covered by the presumption with accompanying qualifying periods of service. These are:

ITEM	DISEASE	QUALIFYING PERIOD
1	Primary site brain cancer	5 years
2	Primary site bladder cancer	15 years
3	Primary site kidney cancer	15 years
4	Primary non-Hodgkin's lymphoma	15 years
5	Primary leukaemia	5 years
6	Primary site breast cancer	10 years
7	Primary site testicular cancer	10 years
8	Multiple myeloma	15 years
9	Primary site prostate cancer	15 years
10	Primary site ureter cancer	15 years
11	Primary site colorectal	15 years
12	Primary site oesophageal cancer	25 years

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On 7 December 2011, the *Commonwealth's Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Act* 2011 (the Firefighters' Act) amended the disease provisions contained in section 7 of the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) to simplify access to compensation for firefighters covered by the SRC Act.

The amendments introduced a presumption of liability for 12 types of prescribed cancers suffered by firefighters who meet certain qualifying requirements. The presumption applies to those firefighters who are diagnosed with the disease on or after 4 July 2011.

The Firefighters' Act required that the responsible Federal Minister commission an independent review of these provisions which was undertaken and completed in December 2013. The review also inquired and reported on:

- How effective and efficient the firefighter provisions have been in providing streamlined determination of claims made by those firefighters seeking compensation for the prescribed cancers and consideration of the appropriateness of the prescribed cancers.
- What (if any) issues have emerged in the operation of the firefighter provisions, including whether the date of manifestation should be maintained.
- Whether there are other ways to enable the streamlining of the determination of claims made by firefighters consistent with contemporary workers' compensation principles.
- The affordability of any proposed recommendations.

The West Australian *Workers' Compensation and Injury Management Amendment Act* 2013 implements new presumptive workers' compensation laws that benefit career firefighters who contract cancer in the course of performing firefighting duties.

Twelve types of primary site cancer are covered by the presumption with accompanying qualifying periods of service as detailed in the table above.

There is likely to be some compensation claims by firefighters which may fall outside the criterion established for the presumptive legislation which may require the Chief Executive Officer of the Department of Police Fire and Emergency Services to exercise powers to approve some claims on a case by case basis

Provision of benefits for the families/dependants of workers who die in the course of their employment, which otherwise reside either inside or outside the WRAC Act for police and more recently jockeys (death benefits) have some precedent value in terms of the NT Government's responses to some fatalities in these occupations.

In relation to volunteer firefighters, only Tasmania at this time has adopted similar presumptive arrangements including nominating disease types and qualifying periods. Volunteer NT Fire fighters are able to demonstrate claims for diseases under the existing provisions of the WRAC Act. This matter requires ongoing research and development in line with what is evolving in other jurisdictions.

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RECOMMENDATION #34

We recommend:

- *New presumptive workers' compensation legislation as either part of an amended WRCA or new legislation to benefit full time firefighters who contract cancer in the performance of firefighting duties.*
- *Schedule 1 of the WRCA be revised with a specific schedule of deemed diseases to include reference to the 12 types of primary site cancer as well as asbestos and liver cancers which are to be covered by the presumption with the accompanying qualifying periods of service for firefighters.*
- *The criteria for (i) date of injury and (ii) the application of the presumptive legislation to firefighters be developed by NT WorkSafe.*

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2.
TAKE INTO ACCOUNT THE RELATIONSHIP BETWEEN THE SCHEME AND THE NATIONAL INJURY INSURANCE SCHEME

A National Disability Strategy was one of the key recommendations of the 2007 Senate Inquiry into the Commonwealth, State and Territory Disability Agreement (CSTDA).

The Disability Investment Group's (DIG) report "The Way Forward: A New Disability Policy Framework for Australia" dated 22 September 2009 principal recommendation was that the Commonwealth Government, in consultation with States and Territories, should commission a comprehensive feasibility study on a National Disability Insurance Scheme (NDIS). The NDIS Scheme:

- Would replace the current arrangements for funding disability services and would work in a similar way as the no-fault injury insurance schemes that currently operate in some States and Territories.
- Should be complemented by nationally consistent state/territory based insurance schemes covering motor accident, workers' compensation, public liability (general injuries) and treatment injury.

We understand Disability Care Australia will have full coverage across the NT by July 2019[138].

Paragraph 4 of the Heads of Agreement between the Commonwealth and the Northern Territory Governments on the National Disability Insurance Scheme[139] provides that the NDIS in the Northern Territory will:

> a) *"Provide all eligible Northern Territory residents with access to a scheme based on insurance principles that guarantees lifetime coverage for participants for the cost of reasonable and necessary care and support.*
>
> b) *Provide people with disability the choice and control over their disability supports.*
>
> c) *Guarantee a sustainable funding model for the provision of disability supports into the future."*

In relation to "participant outcomes and experience, service interventions, service delivery models" and the "development of an effective market for disability services, the interface between the NDIS and other services, scheme administration, implementation strategies, costs and liabilities", paragraph 6 of the Heads of Agreement provides that the full NDIS in the NT will build on the:

- Lessons learned from the NDIS launch, including through the NDIS performance framework.
- NDIS launch evaluation.
- Reviews of the *National Disability Insurance Scheme Act* 2013 (Cth), rules and operational guidelines.
- Intergovernmental Agreement for NDIS Launch.

It is expected that the NT "and the Commonwealth will continue to work together, consulting with [Disability Care Australia] to settle design and operational matters, as well as legislation for the full scheme, including interoperability with Northern Territory laws[140]".

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[138] See http://www.ndis.gov.au/council-australian-governments

[139] See http://www.ndis.gov.au/sites/default/files/documents/Heads_of_Agreement_Commonwealth_and_NT_NDIS_0.pdf

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Paragraphs 40, 41 and 42 of the Heads of Agreement state:

> 40) *The Northern Territory commits to develop and agree, and endeavours to implement, nationally-consistent minimum benchmarks for workplace accidents by 1 July 2016. If nationally-consistent minimum benchmarks are not implemented in the Northern Territory by 1 July 2016, the Northern Territory will be responsible for 100 per cent of the cost of NDIS participants who are in the NDIS because they are not covered by an injury insurance scheme that meets these requirements.*
>
> 41) *The Northern Territory and the Commonwealth will continue negotiations, through SCFFR, on no fault medical injury coverage.*
>
> 42) *When the full scheme commences, jurisdictions without equivalent motor vehicle and workplace schemes will be responsible for 100 per cent of the costs of their citizens and visitors who enter the NDIS due to disability caused by relevant accidents within their jurisdiction.*

As can be seen, the details of the operations of the NDIS in the NT are a work in progress. However, the NDIS is designed to work with the NT workers' compensation scheme.

Essentially, State and Territory worker's compensation schemes will remain the same except that we understand serious and catastrophic work related injury claims, which meet agreed whole of person injury thresholds, will be transferred to the NIIS.

The NDIS "Operational Guideline – Compensation – Overview[141]" sets out an overview of how compensation is treated. These guidelines provide:

> 10) *The NDIS is designed to complement, not replace, existing compensation arrangements for personal injury.*
>
> 11) *The NDIS Act and Supports for Participants – Accounting for Compensation Rules are about ensuring that when a person receives, or is entitled to receive, compensation payments the NDIA:*
>
> a) *Recovers NDIS amounts paid to a participant where compensation has been paid, or will be paid, for the same supports.*
>
> b) *Ensures that the reasonable and necessary supports stated in a participant's plan are reduced to take account of the compensation payments received, or given up, by a person."*

The interaction between the NDIS and the Scheme in relation to the provision of care and access to benefits, and the relationship between the NDIS and the Scheme has yet to be fully determined.

RECOMMENDATION #35

Regarding the NDIS, consideration be given to minimum benchmarks (pending); and the NIIS, we recommend that provisions related to the seriously injured be aligned with this Commonwealth scheme.

[140] *Commonwealth and Northern Territory Governments (2013) 'Heads of Agreement between the Commonwealth and the Northern Territory Governments on the National Disability Insurance Scheme paragraph 12' pp1-8.*

[141] *See http://www.ndis.gov.au/sites/default/files/documents/og_compensation_overview.pdf*

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3. TAKING INTO ACCOUNT INCENTIVES AND DISINCENTIVES FOR THE REHABILITATION OF INJURED WORKERS AND RETURN TO WORK, CONSIDER RECOMMENDATIONS REGARDING THE PAYMENT OF LUMP SUMS IN VIEW OF THE REHABILITATION AND RETURN TO WORK FOCUS OF THE SCHEME BY:

a) Commutation, to include weekly payments and future medical, hospital and rehabilitation costs.

b) Negotiated agreements, to include weekly payments and future medical, hospital and rehabilitation costs.

c) Limited recourse to common law.

Lump sums under the WRCA

Hunt and Upjohn[142] provide a useful summary[143] of the thesis behind the use of lump sums to settle and resolve workers' compensation claims.

> *"Sometimes instead of receiving weekly or monthly wage replacement benefits and fully paid medical care, workers negotiate a settlement (also referred to as a compromise and release agreement) with their employers and/or insurers. Such an agreement is often made in cases where the compensability of an injury is in dispute. Settlements are also common in cases where the parties disagree about the amount of benefits due in the future for an admittedly compensable injury because the amount is subjective, or difficult to ascertain in advance.*
>
> *The settlement typically provides the worker with a one-time payment that represents the amount agreed to (the compromise) as the worker's recovery. Settlements where compensability is disputed, however, recognize that there is a possibility that the worker may not receive any recovery and therefore are usually more deeply discounted. A settlement generally limits or terminates the employer's liability (the release).*
>
> *Thus, it is a "compromise" agreement that "releases" the employer from liability, or a "compromise and release." The rules governing such settlements vary widely, with some jurisdictions not allowing them at all, some allowing them only under specific circumstances, and some being fairly free with approval of such agreements.*
>
> *Most states are careful to not approve settlements that make insufficient allocations for future medical expenses, or they allow for the medical part of the settlement to be reopened if need be.*
>
> *There is another group of settlements that reflect litigation over the degree of disability or the residual work capacity of the injured worker. Such cases revolve around the medical aspects of the case (especially causation) and the implications for the future work capacity of the individual. These disputed cases can involve very expensive and time consuming litigation within the overall administration of this no-fault insurance system."*

In the year ended 30 June 2013, insurers in the Northern Territory paid $83.2m in claims costs, of which $12.9m related to short term weekly compensation (under 26 weeks of incapacity) and $13.9m for long term incapacity (greater than 26 weeks). Lump sums by commutation ($0.5m) and Hopkins Agreements ($24.6m)

[142] *Allan Hunt, A, and Upjohn, W.E. (2004) ''Introduction to Adequacy of Earnings Replacement in Workers' Compensation Programs] Institute National Academy of Social Insurance' pp1-18.*

[143] *Albeit a US based author, the comments would apply to the Australian context.*

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account for 30% of claims costs. This indicates a widespread demand for lump sums as a key tool for managing claims and has been evident for over two decades of scheme experience.

As noted previously in this Report, regarding the direct compensation payments, 49% were paid in weekly compensation and 51% in lump sums (QLD 30% and 70%; and Comcare 89% and 11% respectively).

There is no data available to indicate what proportion of the lump sums were paid to settle disputed claims and to identify amounts paid to resolve and close long term claims. Anecdotally, the majority of lump sum payments probably relate to the closure of long term claims.

Settlement of disputed claims

Where compensability of an injury is in dispute, there is no provision in the legislation permitting a settlement and contracting to release liability. This is because of the contracting out provision of the WRCA, section 186A.

Given the premise behind dispute resolution is settlement and compromise, it seems antithetical for the legislation to be absent provisions enabling settlement and the making of offers.

RECOMMENDATION #36

We believe there should be provision in the legislation to allow for the settlement of disputed claims for compensation (whether disputed on a question of fact or law or both); and settlement of contested Applications to the Work Health Court.

Payment of lump sums to close claims

There is no provision in the WRCA for the finalisation of the claim as a whole by the payment of a lump sum. However, and as indicated in this Report, the use of lump sums is prevalent. The use of Hopkins Agreement[144] is widespread, and lump sums paid that way account for a third of annual scheme costs.

Although commutation under section 74 of the WRCA was intended as the principal (and only) path to a lump sum (for weekly compensation), that provision has been ignored in favour of the Hopkins Agreement. Reasons for this probably include that medical, surgical and rehabilitation expenses may not be commuted under section 74; the maximum amount available under section 74 is limited to 156 x NWE / AWE (whichever is the greater); and a commutation must be approved by the Work Health Court taking into account a number of factors[145]. The informal Hopkins Agreement has none of these considerations.

The philosophy underpinning the WRCA was to supplant common law for a comprehensive range of benefits paid on a 'no-fault' basis, with an emphasis on rehabilitation; and to discourage lump sums, save for certain restricted[146] circumstances.

[144] *In May 1997, Justice Angel of the Supreme Court of the Northern Territory in Merle Hopkins v Collins/Angus & Robertson Publishers Pty Ltd considered an agreement which later became known as the 'Hopkins' Agreement. Under the Hopkins Agreement, the worker can at any time proceed with the claim, albeit on repayment of the sum pursuant to the deed; see Hopkins v Collins / Angus & Robertson Publishers Pty Ltd [1997] NTSC 182.*

[145] *Rehabilitation is complete; the worker has an earning capacity; the worker understands the effect of a commutation; and the worker has received financial counselling.*

[146] *See section 74, WRCA.*

As discussed elsewhere in this Report, the Review noted that there was strong demand for lump sums for several legitimate reasons. One stakeholder advised us in "practice, lump sum negotiated settlements work". Another submitted: "where an employer and employee have agreed rehabilitation is complete however the worker continues to have a residual incapacity that will not resolve in the medium to long term, the parties should be able to agree to settle such claims in the interests of both parties".

There are risk factors associated with the payment of lump sums include:

- The availability of lump sums may compromise the rehabilitation incentives for both employers and injured workers.
- Employers may find it easier to pay lump sums than to seriously look at rehabilitation and return to work.
- Injured workers may find it rational to wait for a lump sum than to focus on a return to work.
- History shows some schemes (SA, NSW and Victoria) have at times suffered losses due to the sustained use of lump sums to terminate claims. Purcal and Wong state: "Neary and Walsh (1996) similarly find that the benefit level is a key factor affecting WC claims. Their study of NSW, Victoria and South Australia finds that one of the principal reasons for instability of the systems in 1980s was the increased benefits, in particular, lump sum and common law payments. Increased benefit levels reduced the incentive for injured workers to return to employment. The Grellman (1997) report also found that increased benefits in the form of increased litigious lump sum payments awarded by courts resulted in higher claims costs and frequency of claims in NSW[147]".

Whilst these may be the risk factors, there are no studies, as far as we are aware, as to the extent, if any, Hopkins payments may have acted against rehabilitation and return to work.

We observe Hopkins lump sums have been available for nearly 20 years in a self-regulated environment; and it seems that has coexisted with the normal management of claims in that time in terms of rehabilitation and return to work.

We are not aware Hopkins payments have impacted on the viability of the Scheme. Conversely, we think Hopkins payments have probably helped sustain the Scheme.

Having said this, we agree the availability of a lump sum should not work against effective rehabilitation; and or increase the cost of the Scheme. Mechanisms to control the risks in this regard revolve around a third party approving the payments of lump sums (such as the Regulator, Tribunal or Court) and a requirement that certain criteria be met such as lump sums may be paid not less than, for example, 2 years after the date of injury; that rehabilitation options have been exhausted; and the medical condition has stabilised (more or less similar to the requirements set out in section 74(1)(b) of the WRCA[148]).

As noted, currently Hopkins payments are made in an unregulated environment. The practice and policy towards to the payment of lump sums would vary between employers and between insurers.

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[147] Purcel, S and Wong, A. (2013) 'Australian Workers' Compensation: A Review; October 2007- Inquiry into the Operation of Queensland's Workers' Compensation Scheme Report No. 28 Finance and Administration Committee'p12.

[148] "his or her condition has stabilized; rehabilitation is complete; he or she is not totally incapacitated within the meaning of section 65(6); and he or she has received financial counselling".

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Stakeholder feedback encouraged as low regulation as possible around the payment of lump sums. Insurers and employers want to maintain the flexibility to negotiate directly with workers and did not think imposing criteria was necessary. Parties thought they were capable of determining and protecting their own interests without some external control.

We think that any lump sum payment covering all entitlements should have these features:

- Payable after two years.
- Any payment short of two years post incapacity would require Regulator or Court approval.
- All reasonable RTW, rehabilitation and retraining options have been exhausted.
- The worker has obtained independent legal and financial advice.

Provision should also be made for boundaries around recurrences and further claims in current employment or other employment, after the receipt of the lump sum. This could probably be effected by requiring the reporting of lump sums payments to the Regulator and the establishment of a register of lump sums contain all relevant information, including of the nature and extent of the injury and the nature and extent of the amount paid and the circumstances in which it was paid.

RECOMMENDATION #37

We believe the WRCA should provide for formal machinery enabling negotiated settlements of statutory benefits in the appropriate cases, as noted above. We accept the legislative machinery of negotiated settlements should seek to avoid the availability of lump sums militating against effective rehabilitation. Provision should also be made for boundaries around recurrences and further claims in current employment or other employment, after the receipt of the lump sum.

Calculation of the lump sum

Table 2 of Annexure 7 (current and proposed benefit structure), sets out the proposed benefit structure. In relation to weekly payments of compensation, lump sums for that benefit would be assessed along similar lines to sections 21 and 22 of PILDA. The:

- Calculation of future weekly compensation would be based on assumptions about the injured worker's future earning capacity; and accord with the injured worker's most likely future circumstances had the injury not occurred. An adjustment would be made to the amount of future weekly compensation by reference to the percentage possibility that the events might have occurred regardless of the injury.
- Future weekly compensation lump sum would be paid at discounted present values. The discount rate, expressed as a percentage, would be prescribed by the Regulations.

RECOMMENDATION #38

We recommend that provision be made for the assessment of weekly payments of compensation component of lump sums in accordance with principles similar to sections 21 and 22 of PILDA.

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Annuities

Particularly in the case of catastrophic claims, and concerns about the management of a significant lump sum, a lump sum amount can be paid by way of an annuity.

PILDA refers to them as structured settlements. Section 31 of PILDA provides that "structured settlement means an order providing for the payment of all or part of an award of damages by one or both of the following means: (a) periodic payments funded by an annuity or other agreed means; (b) periodic payments in respect of future reasonable expenses for medical, hospital, pharmaceutical or attendant care services, payable as those expenses are incurred."

RECOMMENDATION #39

We recommend there be provision for structured settlements.

Common law

Common law damages for employment-related injuries are not available in every Australian workers' compensation jurisdiction. Since the mid-1980s, all jurisdictions except the Australian Capital Territory have restricted the availability of damages at common law, and some jurisdictions have completely removed access to common law damages, for employment-related injuries[149].

RECOMMENDATION #40

Particularly in light of our recommendations relating to negotiated lump sums, we think that statutory workers' compensation should remain the exclusive remedy for an injured worker for a work related injury and that the scheme maintain the abolition of the common law action by a worker against his or her employer.

[149] *Hanks, P. and Hawke, A. (2012) 'A review of the Safety Rehabilitation and Compensation Act 1988 - Issues paper, paragraph 10.1' p209.*

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4.
IDENTIFY AND RESOLVE ANOMALIES IN THE LEGISLATION AND IN THE OPERATION OF THE SCHEME.

Objectives of the legislation

Section 62A of the (NT) *Interpretation Act* provides that in "interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object."

Although NT WorkSafe has as one of its functions[150] to "further the objects of" the WRCA, there are no objects of the WRCA specified. The WRCA does state, however, that it is an "Act about workers' rehabilitation and compensation."

Previously, the Northern Territory workers' compensation legislation came with the following 'long title' or statement of objectives:

> *"An ACT … to promote the rehabilitation and maximum recovery from incapacity of injured workers, to provide financial compensation to workers incapacitated from workplace injuries or diseases and to the dependants of workers who die as the results of such injuries or diseases, to establish certain bodies and a fund for the proper administration of the Act, and for related purposes."*

Although the objectives of the WRCA, are, or should be, apparent from its terms, it can be helpful to state them. Annexure 9 sets out the objects of workers compensation legislation in Queensland, Victoria, Tasmania and South Australia.

RECOMMENDATION #41

We recommend some or all of the following be stated as objectives of the WRCA:

The WRCA is an Act about workers' rehabilitation and compensation and provides for the:

- *Prompt and effective management of workplace injuries in a manner that promotes and assists the return to work of injured workers as soon as possible.*
- *Effective rehabilitation of injured workers and their early return to work.*

And ensure the Northern Territory workers compensation scheme:

- *Is fair, affordable, efficient and effective.*
- *Provides adequate and just compensation to injured workers; balanced to ensure workers compensation costs are contained to reasonable cost levels for employers and minimise the burden on Northern Territory businesses.*

Setting of Premiums

The Preliminary Report set out a discussion regarding the role of the Scheme Monitoring Committee in monitoring premium rates[151].

[150] *Section 6(1)(ac), WRCA.*

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In light of undercharging of premium as indicated by the Scheme Actuary, stakeholders submitted that insurers should be responsible for charging adequate premium. Employers were concerned about unanticipated and significant increases in premium. As one stakeholder put it, workers' compensation insurance is "a necessity not a choice."

The NT Chamber of Commerce submitted that in "the Northern Territory workers' compensation premiums have been identified as one of the key costs impacting on SME's. We have been provided with specific examples of premium costs rising substantially, resulting in some cases with business closures and in others with businesses adopting procedures outside the scope of the existing legislation. There should be consideration given to the introduction of a cap on annual price increases, preferably with insurer agreement".

The ICA submits that the principle of underwriting risk "based on industry and claims history [should continue] and submits that it ensures the following benefits to the NT workers' compensation scheme: providing price incentives to employers to improve workplace safety; providing price incentives to employers to promote early return to work processes; and competition amongst insurers encourages innovation in risk and claims management".

Ultimately, issues of pricing turn on several variables, including health and safety at the workplace and the nature and extent of compensation benefits in the event of injury.

RECOMMENDATION #42

We recommend NT WorkSafe and the Scheme Monitoring Committee to continue examining pricing, funding ratios and scheme performance.

Recovery of payments

RECOMMENDATION #43

We think there should be specific provision in the WRCA to allow for the recovery of compensation where the compensation:

- *Has been paid because of a false or misleading statement or representation.*
- *Has been paid because of a failure or omission to comply with a provision of the WRCA.*
- *That should not have been paid (for example, overpayments).*

Regarding the last point (over payment) there was some concern about trying the recover money paid via incorrect or inaccurate assessment of compensation by the employer or insurer. We think there is merit in this and accordingly, whilst there should be a right to recover overpayments, there ought to some bar to this where the insurer or employer has failed to calculate benefits accurately or the period over which the overpayment seeks to be made is old (for example, no recovery after 6 months has elapsed).

[151] *Roussos, G. and Crossin, M. (2013) The Review of (NT) Workers Rehabilitation and Compensation Act Preliminary Report November 2013 p 74.*

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Older workers

All jurisdictions (except WA) adopt arrangements for coverage of older workers which extend coverage for workers to the Commonwealth's pension age based arrangements. All schemes (except WA) cover workers until age 67.

The Commonwealth is proposing the extension of the retirement age for accessing pension benefits to 70 years from 2035.

The contemporary reality is that many workers are increasingly participating in the workforce beyond age 65 years. There is little evidence or pattern of substantial work-related injury in this particular age group. Arguments to discriminate against workers on the basis of age should not be encouraged.

Currently, if you are injured and sustain compensable incapacity, your entitlement to weekly compensation may be limited to 26 weeks beyond 65 years of age.

RECOMMENDATION #44

We recommend provision to be made for weekly payments for up to 104 weeks of incapacity for older workers injured at or about the legislative retirement age. A cut off of weekly benefits once the worker reaches the age at which they are eligible for the age pension with a time limited benefit of 104 weeks if they are injured within 104 weeks of reaching retirement age or after reaching retirement age.

Contractual indemnities

On 27 September 2012, WorkCover WA issued a Bulletin[152] in relation to contractual indemnities. WorkCover WA was concerned that certain contractual indemnities and "mutual indemnity arrangements are not contemplated by the Act and threaten the viability of the workers' compensation scheme."

WorkCover WA described the arrangement as follows:

> *"The arrangements observed by WorkCover WA involve an upward indemnity between principal and contractor and also a sideways indemnity between all contractors engaged on the same project. The arrangement is established by a 'mutual indemnity' and 'hold harmless' scheme between the contracting parties. The contract between the parties is accompanied by a waiver of subrogation against any other party or the principal. The intention is that each party will bear their own costs and will not sue or seek recovery or contribution from other signatories to the agreement."*

WorkCover WA concluded that these "arrangements should not be adopted in commercial contracts or endorsed via extensions to employer indemnity insurance policies."

One Northern Territory approved insurer submitted that project insurance and indemnity contractual arrangements and deeds of mutual indemnity noted by WorkCover WA exist in the Northern Territory and should be reviewed (for consistency with the WRCA).

[152] http://www.workcover.wa.gov.au/NR/rdonlyres/757B83E9-956B-4AE9-BA9E-7A66E04D3ACD/0/Publication__Bulletin_201202_Contractual_Indemnities.pdf

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The features of the contractual indemnities we understand are currently in use in the NT are as follows:

- The contract between the parties typically includes a waiver of subrogation against any other party or principal.
- The intention is that each party will bear their own loss in regard to negligence claims and will not sue or seek recovery from other parties to the agreement.
- There is provision that no other party will be able to subrogate against any other party or their insurer.
- Workers' compensation insurers are required to agree to waive their rights of subrogation.

The submission by the approved insurer is that the WRCA should be amended to include specific provisions prohibiting and nullifying contractual indemnities to third parties. Other approved insurers have supported this.

The approved insurer submits the:

- Workers' compensation policy of insurance must be in accordance with Schedule 2 of the WRCA[153].
- WRCA does not permit a contracting out of any of the provisions of employers' indemnity policy in Schedule 2[154].
- The release and indemnity provisions of contractual indemnities infringe s186A of the WRCA (section 186A(2) states that a "contract or agreement which purports to exclude or limit the application of this Act or to exclude or limit the rights or entitlements of a person under this Act is, to that extent, null and void").

The approved insurer submits the WRCA should be amended to "include legislative provisions specifically prohibiting and nullifying contractual indemnities to third parties other than principals (sideway indemnities)."

Another approved insurer agrees that mutual indemnity arrangements may transfer public liability claims costs to the workers' compensation scheme and present an unquantifiable risk to underwriters; and supports prohibition of contractual shifts of indemnity and waivers of rights of subrogation only where it results in the shifting of public liability claims costs to the NT Scheme (ie 'sideward movement' of indemnity with an associated 'sideward' waivers of rights of subrogation).

Indemnities in contracts are not new. Risk sharing between parties is common, particularly in the oil and gas industry. In a paper titled *Contractual indemnities in Oil and Gas Contracts*[155] Donald Gibson informs us as follows:

- The "purpose of a contractual indemnity is to amend the common law position".
- The "Oil and Gas industry makes it one of the world's most challenging and complex industries in which to understand, draft and negotiate contracts".
- The "Mutual indemnity, commonly referred to as the "knock for knock" indemnity, is circular in nature".
- These "cross-indemnities are usually intended to be effective even if the losses arose due to the negligence, breach of statutory duty or breach of contract of the party receiving the benefit of the indemnity".

[153] *Section 126(4), WRCA.*

[154] *Section 186A, WRCA.*

[155] *http://www.ivoryresearch.com/writers/Donald-Gibson-ivory-research-writer/*

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- "Fault based indemnities are often enforced through expensive and time-consuming litigation to determine liability and responsibility which, in turn, can lead to increased legal costs."

Mr Gibson concludes that however "possible it is to "contract around" the common law, in the absence of explicit language to that effect, the expensive and time-consuming process of litigation to determine liability and responsibility which the industry despises so much becomes inevitable".

In his paper[156], *Indemnity in the International Oil and Gas Contracts: Key Features, Drafting and Interpretation*, Makarov advises indemnities have an important use in the petroleum industry for a number of reasons, including "the hazardous, complex and capital intensive nature of the industry with higher risk exposure and the need to think, how to avoid significant time and costs of something, that is not related to the core of the business, for example litigation."

To illustrate the point, Makarov provides this example:

> *"If one of the contractor's employees was injured at the rig he can sue any party that is potentially liable for the injury. It can be an operator, another contractor, another contractor's subcontractor, the contractor itself or combination of all or any of these parties. It may be extremely difficult to determine the liability level in this situation. Even if it is identified, there may be various appeals, counterclaims and other time and cost consuming procedures. That is why parties agree that each employer accepts responsibility for his own employees and indemnifies his counterparts from any related claims."*

In the North Sea and Irish Sea, we understand that an industry mutual hold harmless deed (IMHH) applies[157].

The "primary objective of the industry mutual hold harmless deed (IMHH) is to address the contractual gap that traditionally exists between contractors working on the UKCS with regard to the allocation of liability. On an offshore installation an operator will award contracts to a contractor who may sub-contract to its sub-contractors. This provides a vertical relationship between some of the parties but no relationship across contractors and sub-contractors…. It operates on the premise that a company is in a much better position to protect and insure their own people and equipment. In doing so, companies can be more certain of the risks they need to insure and this, in turn, reduces multiple policies insuring the same risk[158]".

Several companies are signatories[159] to the IMHH. The IMHH is limited to offshore activity[160]; however, if "two or more signatories wanted to enter into a separate mutual hold harmless agreement between themselves in order to cover onshore risks they would, of course, be free to do so".

Leaving aside the IMHH and the situation in the North Sea, regarding the imposition of indemnities by the major contractors on smaller companies, these smaller businesses may be at a disadvantage, as accessing appropriate insurance cover can be difficult; and, when found, expensive. Whilst the smaller operators would not be able to afford to self-insure, if they wish to access the work offered by major contractors, the smaller business may be placed in a situation where it has no choice but to agree to any contractual indemnity required of the larger contractor.

[156] Makarov, Timur; Indemnity in the International Oil and Gas Contracts: Key Features, Drafting and Interpretation, Centre for Energy, Petroleum and Mineral Law and Policy http://www.dundee.ac.uk/cepmlp/gateway/

[157] See http://www.logic-oil.com/imhh

[158] See http://www.logic-oil.com/imhh

[159] http://www.logic-oil.com/imhh/signatories-download

[160] http://www.logic-oil.com/imhh/general-guidance

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In the United States, steps have been taken to address the balance of power differences between large oil and gas owners and operators; and small contractors. The US legislation is designed to deal with prime contractors "demanding their contractors indemnify them not only against negligence on the part of the contractor, but also any possible negligence of third parties, including their own. The practice was judged to be not only unfair, but was seen to be placing severe strain on the contractors' bottom line[161]".

Palmer and Robertson[162], note that "several oil producing states – including Texas – have enacted statutory provisions that limit the scope of allowed indemnity provisions. In particular, these statutes will at time render unenforceable an indemnification provision that purports to require indemnification for the indemnitee's own negligence". These are referred to as Oilfield Anti-Indemnity Acts. In the United States, Louisiana, New Mexico, Wyoming and Texas have[163] such laws. The Texas Oilfield Anti-Indemnity Act has been in force since 1973[164].

Haider[165] reports that on 1 January 2012, in addition to the Texas Oilfield Anti-Indemnity Act, the Texas Anti-Indemnity Law commenced with the effect of rendering void and enforceable "any provision within a contract requiring the contractor to indemnify, defend or hold harmless another party for any claim arising from the party's own negligence. Any clauses requiring that contractors take out insurance for any of the obligations prohibited under [the law] are also void and unenforceable".

Contractual indemnities are a complex area of the law and business practice. There are many practical considerations to take into account, including the nature of the particular project. It appears there are at least two approaches in dealing with the situation – that applying to projects in the North Sea; and the steps taken in the oil producing states of the US to ban some contractual indemnities in certain circumstances.

A proper evaluation of these matters will require further research, legal and commercial; reference to other jurisdictions and consultation with the industry.

RECOMMENDATION #45

We recommend the use of contractual indemnities, including in relation to the waiver of subrogation and the mutual indemnity irrespective of cause and notwithstanding negligence, should be reviewed.

Liability "independently of the Act"

Section 126(1) of the WRCA requires every employer to obtain a policy of insurance to cover the employers liability under the WRCA and "for an amount of not less than the prescribed amount in respect of his or her liability independently of" the WRCA. The prescribed amount is $2 million[166].

[161] *Haidar, T The Texas Anti-Indemnity Law – what does it mean for your business? Oil and Gas IQ, 12 March 2012.*

[162] *King & Spalding, Energy Newsletter, "Oilfield Anti-Indemnity Statutes May Invalidate Some Contract Provisions", January 2014 .*

[163] *Redfern, R Jr, Oilfield Anti-Indemnity Acts and Their Impact on Insurance Coverage: A Comparative Analysis, 22 August 2005, Insurance Journal.*

[164] *Haidar, T The Texas Anti-Indemnity Law – what does it mean for your business? Oil and Gas IQ, 12 March 2012.*

[165] *Haidar, T The Texas Anti-Indemnity Law – what does it mean for your business? Oil and Gas IQ, 12 March 2012.*

[166] *Regulation 15, (NT) Workers Rehabilitation and Compensation Regulations.*

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Schedule 2 of the WRCA (which sets out the policy) provides:

> *"…in consideration of the payment by the Employer to the Insurer of the abovementioned … the Employer shall be liable … to pay an amount not exceeding $ in respect of his or her liability independently of the Act for an injury to a worker in his or her employ, then and in every such case, the Insurer will indemnify the Employer against all such sums for which the Employer shall be so liable…"*

Regarding contractual indemnities, in 2001, the Northern Territory Supreme Court in *Erdelyi*[167] decided this policy wording was "confined to the insurance of risk in respect of obligations compulsorily imposed by law upon the employer and not in respect of liabilities voluntarily assumed in contract[168]". That is, the NT policy did not cover the type of contractual indemnity in the *Erdelyi* case.

In what circumstances could there be liability on the employer for an injury to a worker, independently of the WRCA? Liability "independently of the Act" could provide the insured employer with cover regarding recovery actions; claims by dependants; claims by a spouse eg for loss of consortium; and claims by third parties eg; for nervous shock.

RECOMMENDATION #46

We recommend the indemnity provided regarding risks "independently of the Act" should also be reviewed. For example, Section 126 and Schedule 2 could be amended to ensure the insurer is not required to indemnify an employer for claims against statutory schemes of other jurisdictions or liability beyond liability to the injured worker herself or himself.

Regular review of the Scheme

Workers' compensation schemes are by their nature dynamic, complex and influenced by many factors, several external (economic conditions; changes in technology; changes in industry and employment).

Accordingly, a regular review of the Scheme is necessary to maintain stability and sustainability. Most of the stakeholders were in favour of regular reviews. One stake holder put it this way: "100% agree with this, as other laws change and our workplaces' and practices change. With the NT economy changing, new medical procedures and technology fast changing the way things are done, the effects of the implementation of both NDIS and the NIIS it would be foolish to not review the scheme on a 5 year basis".

RECOMMENDATION #47

We recommend that the Workers' Rehabilitation and Compensation Advisory Council should review relevant parts of the Scheme annually and the Scheme be reviewed substantively, every 5 years.

[167] Erdelyi v Santos Limited and Global Marine Bismarck Sea Incorporated and P & O Australia Limited and Territory Insurance Office & Ors [2001] NTSC 15.

[168] Angel J, Erdelyi, paragraph 13.

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Comcare

In March 2014, the Commonwealth government announced[169] that it “introduced reform which seeks to expand access for national employers to compensation and work health and safety coverage under the Comcare Scheme”.

If these proposed reforms are enacted, then the prospect of national employers currently insured in the NT moving out of the Scheme to Comcare is likely to impact on the NT premium pool and would also likely impact Scheme viability and sustainability.

RECOMMENDATION #48

We recommend changes in this regard need to be monitored and the appropriate representations be made to the Commonwealth government regarding the potential impact of the proposed reformed Comcare scheme upon the NT Scheme.

Education and training

Currently, and for the foreseeable future, the Territory will continue to experience skills shortages. Ms Alison Hucks, Principal at Avant Pty Ltd, in a recent Research Paper[170], observed the following:

- ► The Northern Territory has traditionally had a shallow candidate pool of quality candidates, based on population.
- ► This pool has been made progressively shallower including due to the high value of the Australian dollar; high cost of living; the highlighting of the infamous “four C’s” of the Territory: cyclones, crime, crocs and cost of living; the NT has seen a number of major projects commence, and this and other resource and construction projects have placed significant skilled labour pressure though on other NT businesses.

Training and qualified people are essential to the viability of a scheme. Workers’ compensation expert, Alan Clayton says that no matter how a Scheme is designed, success comes about by people case managing effectively. A simple proposition, but that is the view of someone who has looked at Schemes across Australia over many years. Alan Clayton’s conclusion is that implementation by trained and motivated people, strongly influences outcomes. We agree that competency in case management is essential to achieving the outcomes discussed in this report and in managing the Scheme generally.

The Australian Insurance Institute[171] delivers a workshop in workers’ compensation case management and the Diploma of Personal Injury Management. The Personal Injury Education Foundation[172] provides training, including the Certificate IV in Personal Injury Management (Claims Management).

In the Territory, however, we are remote from southern centres and our industry is too small to justify the expense of southern providers delivering formal education specifically designed around our local legislation and environment. Local leadership is required to provide locally driven training opportunities.

[169] http://www.comcare.gov.au/news__and__media/news_latest/government_announces_proposed_changes_to_the_comcare_scheme

[170] *Huck, A. (2013) Avant White Paper – Greatest HR / Recruitment Challenges Facing Northern Territory Employers’ pp1-19.*

[171] https://www.theinstitute.com.au/

[172] http://www.pief.com.au/

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We think NT WorkSafe and training providers such as Charles Darwin University should consider filling the gap and deliver formal training in case management locally; and examine how training can be delivered in the specialised area of workers' compensation claims management. This would assist employers in ensuring the skills of staff, improving retention and providing for meaningful career progression and recognition of this important function.

The market for this training would include insurers, self-insurers, employers, government, rehabilitation providers, return to work coordinators, brokers and others working in the industry.

Training would provide case managers with a professional career path; recognition of their competency and career progression. This should in turn improve job satisfaction, assist staff retention; and address the costs of the high level of employee turnover.

RECOMMENDATION #49

We recommend NT WorkSafe work with registered training organisations to develop relevant and recognised educational pathways for careers in relation to NT workers' compensation law and practice; and examine how training can be delivered in the specialised area of workers' compensation and personal injuries claims management via relevant formal course material to assist the learning and development of case managers and others.

Penalties

It is apparent several of the penalties set out in the WRCA have not been reviewed for a considerable period of time. For example, the penalty for breaching the confidentiality provision[173] is 200 penalty units or imprisonment for 2 years. Contrast the penalty for not taking reasonable steps to provide suitable duties[174] (namely, in the case of a body corporate – 25 penalty units; in the case of a natural person – 8 penalty units or imprisonment for 3 months).

The penalty for failing to report a return to work[175] is 25 penalty units or imprisonment for 6 months.

RECOMMENDATION #50

We recommend NT WorkSafe review and update all penalties provisions in the legislation.

[173] *Section 186B, WRCA.*

[174] *Section 75A(1), WRCA.*

[175] *Section 90, WRCA.*

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7. NT WORKSAFE RECOMMENDATIONS

NT WorkSafe has provided the Review a list of matters for consideration. We list these matters in the following.

DURATION OF INCAPACITY; AGGREGATE OF PERIODS

Sections 64 of the WRCA refers to weekly compensation being paid "in respect of any period during which the total period, or aggregate of the periods, of his or her total or partial incapacity". The reference to "aggregate of the periods" would suggest the legislation envisages incapacity may commence at various times. In section 3, "incapacity" is defined as "an inability or limited ability to undertake paid work because of an injury"; suggesting incapacity is linked to financial loss.

In combination, it would appear that a date of injury may not necessarily be the start of incapacity; and periods of incapacity need not be linear and could be disjointed.

RECOMMENDATION #51

We agree with NT WorkSafe's recommendation that for the purposes of section 64, that provision should reflect the aggregate of the periods of incapacity resulting in actual loss of wages.

CALCULATION OF NWE IN CIRCUMSTANCES OF SHORTNESS OF TIME

NT WorkSafe submits that the subparagraph (d) of the definition of NWE in section 49 of the WRCA, provides that where because of the shortness of time it is impracticable at the date of the injury to calculate NWE, that is to be calculated by averaging the gross weekly remuneration that was earned by the worker during the 12 months preceding the injury, during weeks that the worker was engaged in paid employment (in all employment).

The expression 'shortness of time' is not defined and this could cause delay in benefit payment.

RECOMMENDATION #52

We agree with NT WorkSafe's recommendation that 'shortness of time' be defined to be a period of less than 4 weeks.

VOCATIONAL REHABILITATION PROVIDERS – MUTUAL RECOGNITION

NT WorkSafe submits that to be able to provide vocational rehabilitation services for claimants under the WRCA, the vocational rehabilitation provider (VRP) must be both qualified and accredited by NT WorkSafe. This requirement can cause delay in provision of such services when a claimant under the WRCA requires VRP services interstate.

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RECOMMENDATION #53

We agree with NT WorkSafe's recommendation the WRCA allow for Northern Territory recognition of a qualified VRP accredited in another jurisdiction.

DEEMED ACCEPTANCE

In the case the employer does not make a decision on liability regarding a new claim within time, liability is deemed liable[176].

The deemed acceptance is limited to compensation for weekly benefits and medical and related expenses. The deeming lasts until 14 days after the employer/ insurer properly notifies the claimant of the decision to either accept, dispute or defer liability[177].

NT WorkSafe points out that the provision which deems the employer liable, section 87, allows for a deemed liability to be removed by providing Notice; and this can be effected at any time, even months or years later; which was not the intention. A claim can be in a state of deemed acceptance indefinitely, potentially disadvantaging the claimant because the deemed acceptance does not include permanent impairment nor rehabilitation benefits.

RECOMMENDATION #54

We agree with that section 87 be reviewed to introduce safeguards against delaying a decision regarding liability after a deeming of liability.

MEDIATOR – PROTECTION FROM LIABILITY

Currently mediators appointed in accordance with section 103C(1) of the WRCA are not protected from liability for an act done or omitted to be done in the exercise of their power or performance of their function under the WRCA.

RECOMMENDATION #55

We agree section 181 (which protects specified persons from certain liability) should be extended to Mediators.

[176] *Section 87(1), WRCA.*

[177] *Section 87(1)(a), WRCA.*

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INTERNAL DISPUTE RESOLUTION PROCESS

NT WorkSafe notes that the Northern Territory Best Practice guidelines have been developed by NT WorkSafe in consultation with approved insurers and self-insurers.

An important guideline is the requirement for insurers and self-insurers to have an internal dispute resolution process. NT WorkSafe is not able to ensure this works effectively for government employees because the Northern Territory does not require approval from the Authority to operate as a self-insurer.

RECOMMENDATION #56

We agree with NT WorkSafe's recommendation that insurers, self-insurers (including the Territory) and the Nominal Insurer adopt an internal dispute resolution process, as developed by NT WorkSafe in consultation with those bodies.

ENFORCEMENT OF WORKERS COMPENSATION AND INSURANCE PROVISIONS THROUGH INFRINGEMENT NOTICES

NT WorkSafe submits that it is very time and resource consuming and cost ineffective to prosecute a person for failing to meet their responsibilities under the legislation.

RECOMMENDATION #57

We agree it is reasonable to add to enforcement tools for NT WorkSafe to be provided power to issue infringement notices, for breaches of the workers' compensation and insurance provisions.

NOMINAL INSURER INTERVENTION IN CLAIMS ON UNINSURED EMPLOYERS

In the event of work related injury, if the employer is dead, cannot be located or, in the case of a company, has been wound up; and the approved insurer of that employer cannot be identified, then a claimant can proceed to claim compensation directly from the Nominal Insurer[178].

However, where the employer can be identified and exists, then, a claimant (of an uninsured employer, or insurer who defaults) can claim against the Nominal Insurer only after the following criteria have been satisfied[179]:

a) Firstly, even though the employer is uninsured, the claimant must still make a claim against the employer. The employer would then have time allowed under the WRCA to decide the claim (10 working days).

[178] *(NT) Workers' Rehabilitation and Compensation Act, s167(2).*

[179] *Section 167(1) WRCA.*

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b) Next, either the employer accepts liability (or is deemed liable); or liability is determined by a Court (this can take time); or the employer and claimant enter into an agreement approved by the Court.

c) The employer would then need to default in the payment of compensation (sometimes this is not a straight forward thing to prove).

d) Also, the worker has to show there was no principal contractor involved in the relevant works (as claimants can claim directly against a principal contractor in certain circumstances).

If the claimant can show all these things, then the claimant can claim against the Nominal Insurer. Many delays could be encountered along the way.

By permitting the Nominal Insurer ability to intervene at an earlier time, then the costs of the claim are likely to be better managed and the claimant's entitlements would be better and more quickly addressed by the Nominal Insurer.

Sometimes, it may be feasible for the employer (especially of sufficient resources and means) to be allowed to manage the claim in concert with the Nominal Insurer.

NT WorkSafe also submits:

- The current process can and often does lead to, or result in, considerable delay and poor claims management resulting in hardship for the injured worker and can prejudice the Nominal Insurer because the injured worker may not have had access to appropriate treatment and rehabilitation that could minimise ultimate claims costs.
- These delays and poor management could be minimised by requiring the uninsured employer to forward the claim to the NI as if the NI was their insurer. The NI would then be required to manage the claim on behalf of the employer having full rights of subrogation.

RECOMMENDATION #58

We agree with NT WorkSafe's recommendation that uninsured employers be required to forward claims to the NI as if the NI was the employer's workers' compensation insurer; and that the NI determine and manage such claims.

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8. ACTUARIAL ASSESSMENT

As noted by the Scheme Actuary in the 2012 Actuaries Report, "the nature of workers' compensation liabilities means that there is inherent uncertainty in any estimates of outstanding claim liabilities. As well as uncertainty of future events including changes in the legal or socioeconomic environment that may directly affect the frequency and cost of claims, factors which further increase the uncertainty in our estimates include changes in the insurers' market share (and their claims handling practices) and projection of claim costs more than 15 years after the accident year".

It is possible the changes recommended above:

- Will not reduce costs.
- Could increase costs.

9. DISCLAIMER

The information and material contained in this Report and the Preliminary Report of July 2014 is provided for purposes relating to our recommendations. While every effort is made to ensure the accuracy and relevance of the information, the authors assume no responsibility for its use or interpretation.

The information and discussion in the Report and Preliminary Report is not intended to be advice on any particular matter, or to provide a complete statement of the law, practice or procedure. You should not act on the basis of any material in the Reports without obtaining your own legal or other advice.

ANNEXURE 1

Terms of Reference

Annexure 1 - Terms of Reference

Terms of Reference
Scheme Review

1. Taking into account the:

   (i) the financial sustainability of the Northern Territory Workers Compensation Scheme (Scheme),

   (ii) Scheme's current and future financial position; and

   (iii) impact of the Scheme on the Northern Territory economy, the NT's competitiveness and employment growth,

   assess and make recommendations regarding:

   a) the definition of worker and the relationship with PAYG withholding tax provisions.
   b) achieving the objectives of providing an equitable and cost-effective compensation system, with a particular emphasis on the improved rehabilitation of injured workers and return to work.
   c) weekly and other entitlements to compensation.
   d) the assessment and level of income maintenance.
   e) portability of benefits outside of the jurisdiction.
   f) journey claims.
   g) dispute resolution and a framework to resolve disputes quickly, fairly and at a low cost.
   h) the occupational diseases covered by deeming provisions.

2. Take into account the relationship between the Scheme and the National Injury Insurance Scheme.

3. Taking into account incentives and disincentives for the rehabilitation of injured workers and return to work, consider recommendations regarding the payment of lump sums in view of the rehabilitation and return to work focus of the Scheme by:

   (a) commutation, to include weekly payments and future medical, hospital and rehabilitation costs.

   (b) negotiated agreements, to include weekly payments and future medical, hospital and rehabilitation costs.

   (c) limited recourse to common law.

4. Identify and resolve anomalies in the legislation and in the operation of the scheme.

ANNEXURE 2

Submissions

ANNEXURE 2: SCHEDULE OF SUBMISSIONS

WRITTEN SUBMISSIONS

SUBMISSION	DATE
Local Government Association of the Northern Territory	25 February 2013
Submitted in confidence	May 2013
QBE Insurance	May 2013
Australian Medical Association	28 May 2013
Allianz Australian Insurance Ltd	28 May 2013
Australian Medical Association	28 May 2013
Insurance Council of Australia	28 May 2013
Unions NT	28 June 2013
Submitted in confidence	September 2013
Submitted in confidence	13 October 2013
Michael Gunner	13 October 2013
Australian Medical Association	23 October 2013
Lucio Matarazzo	October 2013
United Voice	8 October 2013
TIO	28 November 2013
Submitted in confidence	21 December 2013
Alice Springs Town Council	23 December 2013
Submitted in confidence	
Submitted in confidence	
Central Australian Aboriginal Congress Aboriginal Corporation	
Northern Territory Police Association	
SDA	
GTNT	
Northern Territory Seafood Council	

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SUBMISSION	DATE
Australia Bay Seafoods Pty Ltd	
Australia Bay Seafoods Pty Ltd	
Zamia Bay P/L	
A Raptis and Sons Pty Ltd	
Submitted in confidence	
QBE Insurance	13 January 2014
Goldband Nominees Pty Ltd	14 January 2014
Wildcard Wildcaught Pty Ltd	15 January 2014
NT Fish Pty Ltd	15 January 2014
Alaska Pty Ltd	15 January 2014
Submitted in confidence	15 January 2014
Submitted in confidence	15 January 2014
Northern Wildcatch Seafood Australia	16 January 2014
Australian Manufacturers Workers Union	17 January 2014
Honeco Pty Ltd	19 January 2014
Wren Fishing Ltd	20 January 2014
Barameda Fisheries FNQ Pty Ltd	22 January 2014
Submitted in confidence	23 January 2014
Cairns Marine	23 January 2014
Ronbridge Pty Ltd t/a Corbett Fisheries	28 January 2014
Submitted in confidence	28 January 2014
Gusto (NT) Pty Ltd	29 January 2014
NPF Industry Pty Ltd	29 January 2014
GIO Insurance	30 January 2014
Submitted in confidence	29 January 2014
Submitted in confidence	29 January 2014
CGU Insurance	3 February 2014
Submitted in confidence	4 February 2014
Fishing Industry Worker Proposal	4 February 2014

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SUBMISSION	DATE
Lucio Matarazzo Pty Ltd	5 February 2014
Australian Medical Association	6 February 2014
Workplace Injury Solutions – DCIS	12 February 2014
Community and Public Sector Union	27 February 2014
Halfpennys	27 February 2014
Insurance Council of Australia	27 February 2014
Submitted in confidence	28 February 2014
Australian Rehabilitation Providers Association NT Branch	28 February 2014
Australian Nursing Federation	28 February 2014
Northern Territory Police Fire and Emergency Services	28 February 2014
NT Working Women's Centre	28 February 2014
Michael Gunner	28 February 2014
Wesfarmers	28 February 2014
Fire Brigade Employee's Union of NSW	28 February 2014
Maritime Union of Australia	28 February 2014
ACTU	28 February 2014
NT Bar Association	28 February 2014
United Voice NT Branch	28 February 2014
St John Ambulance Australia (NT) Inc	28 February 2014
Northern Territory Chamber of Commerce and Industry	28 February 2014
Hall Payne Lawyers	28 February 2014
Law Society Northern Territory	28 February 2014
Submitted in confidence	3 March 2014
Submitted in confidence	4 March 2014
NT Jockeys Association, Troy Walsh	
Submitted in confidence	

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MEETINGS

CONSULTATION	DATE
Unions NT United Voice Community and Public Sector Union, Australian Manufacturing Workers Union, Independent Education Union, Electrical Trades Union	17 October 2013 23 October 2013
TIO	16 August 2013 19 September 2013 8 October 2013
	25 October 2013 3 November 2013
Chamber of Commerce	8 November 2013
Transformation Management Services and Victorian Accident Compensation Conciliation Service	30 September 2013
AMA	12 February 2014
CGU	27 November 2013
Rio Tinto	6 January 2014
NT Police Association	21 February 2014
Professor Alan Clayton	December 2013 March 2014
	April 2014 May 2014
Halfpennys Solicitors	9 May 2014
Allianz	12 May 2014
NT WorkSafe	12 May 2014
QBE	14 May 2014
GIO	21 May 2014
Allianz	29 May 2014
Meeting in confidence	2 June 2014
Meeting in confidence	2 June 2014

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ANNEXURE 3

Section 533 – 537 (Qld) Workers Compensation and Rehabilitation Act

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Strategic Business Counsel

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ANNEXURE 3: SECTIONS 533 – 537, (QLD) *WORKERS COMPENSATION AND REHABILITATION ACT*

533 OFFENCES INVOLVING FRAUD

1) A person must not in any way defraud or attempt to defraud an insurer.

MAXIMUM PENALTY: 500 PENALTY UNITS OR 5 YEARS IMPRISONMENT

2) If conduct that constitutes an offence defined in subsection (1) is recurrent so that, but for this subsection, each instance of the conduct would constitute a separate offence, 2 or more instances of the conduct are to be taken to constitute but 1 offence committed over a period specified in the complaint laid in relation to the conduct, and may be charged and be dealt with on 1 complaint.

534 FALSE OR MISLEADING INFORMATION OR DOCUMENTS

1) This section applies to a statement made or document given:

   a) To the Regulator or WorkCover for the purpose of its functions under this Act; or

   b) To an entity or person as a self-insurer; or

   c) To a registered person for the purpose of an application for compensation or a claim for damages.

2) A person must not state anything to the Regulator, WorkCover, a self-insurer or a registered person the person knows is false or misleading in a material particular.

MAXIMUM PENALTY: 150 PENALTY UNITS OR 1 YEAR'S IMPRISONMENT

3) A person must not give the Regulator, WorkCover, a self-insurer or a registered person a document containing information the person knows is false or misleading in a material particular.

MAXIMUM PENALTY: 150 PENALTY UNITS OR 1 YEAR'S IMPRISONMENT

4) Subsection (3) does not apply to a person who, when giving the document:

   a) Informs the Regulator, WorkCover, the self-insurer or the registered person, to the best of the person's ability, how it is false or misleading; and

   b) Gives the correct information to the Regulator, WorkCover, the self-insurer or the registered person, if the person has, or can reasonably obtain, the correct information.

5) It is enough for a complaint against a person for an offence against subsection (2) or (3) to state the information or document was false or misleading to the person's knowledge, without specifying which.

535 PARTICULAR ACTS TAKEN TO BE FRAUD

1) This section applies if a person:
   a) Lodges an application for compensation with an insurer; and
   b) Engages in a calling; and
   c) Without reasonable excuse, does not inform the insurer, in the way stated under section 136, of the person's engagement in the calling.
2) If compensation is paid by the insurer under the application to the person or anyone else:
   a) After the start of the engagement in the calling; and
   b) Before the insurer is informed in the way stated under section 136 of the engagement in the calling;
   c) The person is taken to have defrauded the insurer of the payments under section 533.
3) If payments to which subsection (2) applies are not made, the person is taken to have attempted to defraud the insurer under section 533.

536 DUTY TO REPORT FRAUD OR FALSE OR MISLEADING INFORMATION OR DOCUMENTS

1) This section applies if:
   a) An employer who is not a self-insurer reasonably believes that a person is defrauding, or attempting to defraud, WorkCover; or
   b) An employer who is a self-insurer reasonably believes that a person is defrauding, or attempting to defraud, the self-insurer; or
   c) WorkCover reasonably believes that a person is defrauding, or attempting to defraud, WorkCover.
2) Without limiting subsection (1), this section also applies if:
   a) An employer who is not a self-insurer reasonably believes that a person has stated anything, or given a document containing information, to WorkCover or a registered person that the person knows is false or misleading in a material particular; or
   b) An employer who is a self-insurer reasonably believes that a person has stated anything, or given a document containing information, to the self-insurer or a registered person that the person knows is false or misleading in a material particular; or
   c) WorkCover reasonably believes that a person has stated anything, or given a document containing information, to WorkCover or a registered person that the person knows is false or misleading in a material particular.
3) The employer who is not a self-insurer must give WorkCover the information the employer has in relation to the defrauding, attempting to defraud, stating of the thing or giving of the document.

MAXIMUM PENALTY: 50 PENALTY UNITS

4) The employer who is a self-insurer must give the Regulator the information the employer has in relation to the defrauding, attempting to defraud, stating of the thing or giving of the document.

MAXIMUM PENALTY: 50 PENALTY UNITS

5) WorkCover must give the Regulator the information it has in relation to the defrauding, attempting to defraud, stating of the thing or giving of the document.

MAXIMUM PENALTY: 50 PENALTY UNITS

537 FRAUD AND RELATED OFFENCES END ENTITLEMENT TO COMPENSATION AND DAMAGES

1) This section applies if a person is convicted of any of the following offences committed against an insurer in relation to an application for compensation or a claim for damages:

   a) An offence under section 533;

   b) An offence or an attempt to commit an offence under the Criminal Code, section 123, 408C or 488.

2) Any entitlement the person may have to compensation or damages for the injury, and any existing claim for compensation or damages, ends.

3) If, in the proceeding for the offence, the prosecution proves the person obtained payment of compensation or damages by the insurer, by conduct that is the offence, then, whether or not a penalty is imposed, the court must, on application by the insurer, order the person to repay the insurer all amounts of compensation or damages paid to or on account of the person as a result of the commission of the offence.

4) The Regulator may represent WorkCover or the self-insurer for subsection (3).

5) An order made by a court under subsection (3) may be enforced as if it were an order made by a court in civil proceedings for a debt.

6) Any costs incurred by an insurer in relation to a proceeding for damages to which subsection (3) applies are to be recovered on a solicitor and own client basis from the person convicted under section 533.

7) Subsection (2) does not apply to a person only because the person is taken under section 535 to have:

   a) Attempted to defraud an insurer; or

   b) Defrauded an insurer of an amount not more than the equivalent of 1 week of the person's normal weekly earnings.

ANNEXURE 4

Table 4.4, Death entitlements, Comparison of workers' compensation arrangements in Australia and New Zealand, July 2014 (draft), Safe Work Australia

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ANNEXURE 4: TABLE 4.4, DEATH ENTITLEMENTS

Source: Comparison of workers' compensation arrangements in Australia and New Zealand, July 2014 (draft)

	LUMP SUM	PERIODIC PAYMENTS	OTHER PAYMENTS
New South Wales	$498,950 — 1987 Act, s25(1)(a). $316,950 — Workers' Compensation Dust Diseases Act 1942, s8(2B)(b)(i).	$126.80 a week to each dependent child — 1987 Act, s25(1)(b). $261.40 weekly to dependant spouse — Workers Compensation (Dust Diseases) Act 1942 s8(2B)(b)(ii). $132.10 benefit paid to each dependent child — Workers Compensation (Dust Diseases) Act 1942, s8(2B)(b)(iii).	Funeral expenses $9000 maximum — 1987 Act, s27.
Victoria	$555 350 — s92A.	Dependant partner — determined by average pre-injury earnings (PIAWE) subject to statutory maximum — s92B: First 13 weeks: ► 95% of earnings ► $2050 max. 14 weeks — 3 years: ► 50% of earnings ► $2050 max. $1370 max. for partner with more than 5 children. A range of payments for dependent children depending on the particular circumstances of the child.	Reasonable funeral expenses, not exceeding $10 375 — s99. Counselling for family members, max. total $5 870 — s99.

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	LUMP SUM	PERIODIC PAYMENTS	OTHER PAYMENTS
Queensland	$554 750 $14 825 for a totally dependent spouse — s200(2)(aa), and $29 640 for each dependant family member other than the spouse, under 16 or a student — s200(2)(b).	Weekly payment of 8% of QOTE ($109.65) for the spouse if there is a dependant family member under 6 — s200(2)(ab), and weekly payment of 10% of QOTE ($137.05) for each dependant under 16 or a student s200(2)(c).	Reasonable funeral expenses — s199, Chapter 3 Part 11.
Western Australia	$283 418 (subject to Labour Price Index (LPI)) notional residual entitlement of the deceased worker — Schedule 1(1).	A child's allowance of $54.20 per week (subject to LPI) for each dependent child up to age 16 or 21 if a student, whichever an arbitrator determines as likely to be in the best interests of that dependant.	Reasonable funeral expenses: not exceeding $9 219 subject to CPI) — Schedule 1(17).
South Australia	Prescribed sum is $462 649 from 1 January 2013 for claims received on or after 1 July 2008. Dependant partner: A lump sum equal to the prescribed sum less any amount that the deceased worker received as compensation for non-economic loss under Division 5 — s45A(5). Dependant partner and one dependent child: 90% of the prescribed sum to partner and 10% to the child. Dependant partner and more than one and not more than five dependent children: 5% to each child with the balance to the partner.	Dependant spouse or domestic partner: weekly payments equal to 50% (less if partially dependant spouse) of the amount of the NWE of the deceased worker — s44(1)(a). Dependant orphaned child: weekly payments equal to 25% (less if partially dependent child) of the amount of the NWE of the deceased worker — s44(1)(b). Dependant non-orphaned child: weekly payments equal to 12.5% (less if partially dependent child) of the amount of the NWE of the deceased worker — s44(1)(d). Dependant relative: may be eligible for weekly payments if WorkCover determines they are eligible in their particular circumstances — s44(1)(e).	Funeral expenses: maximum as at 1 Jan 2013, $9 769, s45B(1) and Regulation40(3).

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Annexure 4: Table 4.4, Death entitlements, Comparison of Workers' Compensation arrangements in Australia and New Zealand, July 2014 (Draft), Safe Work Australia

	LUMP SUM	PERIODIC PAYMENTS	OTHER PAYMENTS
	Dependant partner and more than five dependent children: 75% to the partner and 25% to children shared equally. Dependant orphaned child: A lump sum equal to the prescribed sum less any amount that the deceased worker received as compensation for non-economic loss under Division 5 — s45A(6). [If there is more than 1 dependant orphaned children, that amount is divided equally between them].	The total aggregate payable to all dependants is limited to the amount the worker would have been entitled if the worker was totally and permanently incapacitated — s44(9).	
Tasmania	Maximum payment: $305 759.55 — s67.	A dependant spouse or caring partner is entitled to weekly payments for a period of two years from the date of death calculated at the same rate as the deceased would have received if he/she became totally incapacitated — s67A: ► first 26 weeks following the date of death: 100% of weekly payments ► >26 weeks, up to 78 weeks: 90% of weekly payments, and ► >78 weeks, up to 2 years from the date of death: 80% of weekly payments. A dependent child is entitled to weekly payments paid at 15% of the basic salary ($1150.04 per week), commencing on the expiration of 13 weeks after the date of death — s67A.	—

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Annexure 4: Table 4.4, Death entitlements, Comparison of Workers' Compensation arrangements in Australia and New Zealand, July 2014 (Draft), Safe Work Australia

	LUMP SUM	PERIODIC PAYMENTS	OTHER PAYMENTS
Northern Territory	Entitled to 260 times the average weekly earnings ($366 236 in prescribed proportions (share with children), or such proportions as the Court determines — s62(1).	10% of average weekly earnings ($140.86 for each child under 16 (or 21 if student), for up to 10 children — s63. Limited to 100% of average weekly earnings ($1408.60).	Max: 10% of the annual equivalent of average weekly earnings ($7 324.72) for funeral costs — s62(1)(a).
Australian Capital Territory	$202 988 (September 2013) CPI indexed (to be divided between the dependants — s77(2).	$67.66 per child, CPI indexed — s77(2).	$5 413.01 CPI indexed for funeral expenses — s77(2).
C'wealth Comcare	$492 145.52 — s17(3) and s17(4).	$135.34 a week to each child under 16 (or 25 if full-time student) — s17(5).	Reasonable funeral expenses, not exceeding $10 971.47 — s18(2).
C'wealth Seacare	$492 145.52— s29(3).	$135.34a week to each child under 16 (or 25 if full-time student) — s29(5).	Reasonable funeral expenses, not exceeding $5 966.53 — s30(2).

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Annexure 4: Table 4.4, Death entitlements, Comparison of Workers' Compensation arrangements in Australia and New Zealand, July 2014 (Draft), Safe Work Australia

	LUMP SUM	PERIODIC PAYMENTS	OTHER PAYMENTS
C'wealth DVA	▶ $420.10 per week for partner, or equivalent age based lump sum up to a maximum of $695 787.48 — MRCA s234(4) and s234(5). ▶ $135 612.49 (age-based maximum additional amount for partner where a service death as defined). ▶ $81 365.49 (maximum amount for each "other dependant") to a maximum of $257 663.74 for all "other dependants" — MRCA s263. ▶ $81 365.49 for each child — MRCA s252.	▶ $135.34 a week to each child under 16 (or to age 25 if full-time student) — MRCA s254. ▶ $3.10 MRCA Supplement per week to the partner and each child — MRCA s247.	▶ Reasonable funeral expenses, not exceeding $10 971.47 — MRCA s267. ▶ Medical treatment for partner and each dependent child for all conditions — MRCA s284 and s302. ▶ $2 400 financial and legal advice for partner MRCA s240. ▶ Children's education expenses equivalent to Youth Allowance payable in some circumstances — MRCA s258. ▶ Bereavement payments for a limited time where deceased was in receipt of periodical compensation payments — MRCA s243 and s256.
New Zealand	Spouse: NZ$6 358 Each child or other dependant: NZ$3 179.	Spouse: 60% of the long-term rate of weekly compensation that the earner would have received. Each child and other dependant: 20% of the weekly compensation. If total entitlement exceeds 100%, individual entitlements are reduced on a pro rata basis.	Funeral grant: NZ$5 930. Child care payments: NZ$135.20 for a single child, NZ$81.11 each if there are more than two children, and a total of NZ$189.28 for 3 or more children.

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Annexure 4: Table 4.4, Death entitlements, Comparison of Workers' Compensation arrangements in Australia and New Zealand, July 2014 (Draft), Safe Work Australia

ANNEXURE 5

Section 40, (Vic) *Workplace Injury Rehabilitation and Compensation Act 2013*

ANNEXURE 5: SECTION 40 (VIC) *WORKPLACE INJURY REHABILITATION AND COMPENSATION ACT* 2013

40 WHEN NO ENTITLEMENT TO COMPENSATION

1) There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury caused wholly or predominantly by any one or more of the following:
   a) Management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;
   b) A decision of the worker's employer, on reasonable grounds, to take, or not to take, any management action;
   c) Any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action;
   d) An application under section 81B of the Local Government Act 1989, or proceedings as a result of such an application, in relation to the conduct of a worker who is a Councillor within the meaning of clause 15 of Schedule 1.
2) There is no entitlement to compensation in respect of a heart attack injury or stroke injury that arises in the course of, or that was caused by, a disease, unless the worker's employment was a significant contributing factor to the injury or to the disease.
3) There is no entitlement to compensation in respect of the following injuries unless the worker's employment was a significant contributing factor to the injury:
   a) A heart attack injury or stroke injury to which subsection (2) does not apply;
   b) A disease contracted by a worker in the course of the worker's employment (whether at, or away from, the place of employment);
   c) A recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.
4) If it is proved that an injury to a worker (whether or not intended to be inflicted) was deliberately or wilfully self-inflicted, there is no entitlement to compensation in respect of that injury.
5) Subject to sections 42, 43 and 44, if it is proved that an injury to a worker is attributable to the worker's serious and wilful misconduct (including, but not limited to, being under the influence of intoxicating liquor or a drug), there is no entitlement to compensation in respect of that injury.
6) Subsection (5) does not apply if the injury results in death or severe injury.
7) In this section **management action,** in relation to a worker, includes, but is not limited to, any one or more of the following:
   a) Appraisal of the worker's performance;

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b) Counselling of the worker;

c) Suspension or stand-down of the worker's employment;

d) Disciplinary action taken in respect of the worker's employment;

e) Transfer of the worker's employment;

f) Demotion, redeployment or retrenchment of the worker;

g) Dismissal of the worker;

h) Promotion of the worker;

i) Reclassification of the worker's employment position;

j) Provision of leave of absence to the worker;

k) Provision to the worker of a benefit connected with the worker's employment;

l) Training a worker in respect of the worker's employment;

m) Investigation by the worker's employer of any alleged misconduct:

   i. of the worker; or

   ii. of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness;

n) communication in connection with an action mentioned in any of the above paragraphs.

Permanent blindness means:

a) A field of vision that is constricted to 10 degrees or less of arc from central fixation in the better eye, irrespective of corrected visual acuity; or

b) A corrected visual acuity of less than 6/60 on the Snellen Scale in both eyes; or

c) A combination of visual defects resulting in the same degree of visual loss as referred to in paragraph (a) or (b).

Severe injury means any of the following:

a) A significant acquired permanent brain injury;

b) Permanent paraplegia;

c) Permanent quadriplegia;

d) Amputation of a limb, hand or foot;

e) Full thickness burns that:

   i. Cause permanent severe disfigurement to the head or neck or an arm or a lower leg; or

   ii. Result in a significant permanent inability to undertake the necessary activities of daily living.

f) An injury that results in permanent blindness;

g) A brachial plexus injury that results in the permanent effective loss of the use of a limb;

h) A physical internal injury that results in a significant permanent inability to undertake the necessary activities of daily living.

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ANNEXURE 6

Comparison: duration of claims and step downs

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ANNEXURE 6: COMPARISON: DURATION OF CLAIMS AND STEP DOWNS

STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
Northern Territory	Normal hours by ordinary time rate of pay; or average remuneration over 12 months. Includes overtime and shift work if worked in accordance with a regular and established pattern; does not include superannuation; but does include non-cash benefits of accommodation, electricity and meals.	**Total or partial incapacity** 0 – 26 weeks – 100% of NWE (less amounts actually earned). 26 weeks – continuing, 75% of loss of earning capacity (NWE less the amount you can earn). (note: at 104 weeks, assessment of earning capacity, whether or not employment is available.	There is no dollar cap.	Weekly payments cease on retirement at age 65 – 67.	There is no common law. An employee may not sue her/his employer for common law damages.	No formal provision in the legislation to allow for lump sum finalisation of medical cost. Weekly payments may be commuted, but this is restricted.

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
Tasmania	The weekly payment is the greater of: ▶ NWE; or ▶ Ordinary-time rate-of-pay for work engaged in immediately prior to incapacity. NWE is the worker's average weekly earnings with that employer over the previous 12 months or the period of employment if less than 12 months. Overtime not included unless it was regular and would have continued to be paid if the worker was no incapacitated.	A worker who is incapacitated (either totally or partially) for work is entitled to weekly payments. 0 – 26 weeks: ▶ 100% of the weekly payment. For workers who are back at work for 50% or more of their normal weekly hours the following step downs do not apply. For workers who are not back at work for more than 50% or more of their normal weekly hours, the follow step downs apply to the difference between what they are earning and their NWE: 27 -78 weeks: ▶ 90% (or 95% if the employer fails to provide suitable alternative duties) of the weekly payment. **Maximum periods of entitlement:** 78 weeks – 9 years if less than 15% WPI, or 78 weeks – 12 years if greater than 15% WPI but less than 20% WPI, or	Minimum weekly payment is 70% of the basic salary (70% of $811.14 per week = $567.80 per week as at 1 January 2014) or 100% of the weekly payment — whichever is the lesser amount (or pro rata equivalent) — s69B(3). There is no dollar cap for total benefits paid.	A worker is no longer entitled to weekly payments once they turn 65. This age restriction overrides the maximum periods of entitlement. If injury occurs on or before age 64, compensation ceases at 65. If injury occurs after 64, compensation ceases one year after injury occurs. The Tribunal may allow payments to continue where the worker would have continued to work beyond age 65 — s87.	Yes – limited. A worker who suffers a WPI of 20% for an injury that occurred on or after 1 July 2010 may be entitled to pursue common law damages. If a worker enters into an agreement to settle their entitlements under the Act, they are not entitled to common law damages.	In certain circumstances, the worker and the employer can enter into an agreement to settle the worker's claim. The worker receives one lump sum payment (a once and for all payment) to cover their remaining entitlements to compensation. For a settlement within 2 years from the date of claim for compensation, the agreement must be approved by the Tribunal. The Tribunal may only approve an agreement if it is satisfied that: ▶ all reasonable steps have been taken to enable the worker to be rehabilitated, retrained or to return to work; or ▶ the worker has returned to work. Agreement to settle made more than 2 years after the date of the claim was made do

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
	Bonuses are not included (s70(2)(ac)).	78 weeks – 20 years if greater than 20% WPI but less than 30% WPI, or 78 weeks – 65 years old if greater than or equal to WPI: ► 80% (or 85% if the employer fails to provide suitable alternative duties) of the weekly payment.				not have to be approved by the Tribunal.
Victoria	Weekly payments are usually based on the average of the worker's ordinary earnings during the relevant period (PIAWE). The relevant period for the purposes of a worker's PIAWE is usually 52 weeks before the injury. If a worker has been with their employer for less than 52 weeks, the relevant period is the period of	**0-13 weeks** No current work capacity: ► 95% of PIAWE to a maximum of the dollar cap. Some current work capacity and returned to work: ► 95% of PIAWE to a maximum of the dollar cap and minus current earnings in a week: or Some current work capacity and not yet returned to work: ► 95% of PIAWE to a maximum of the dollar cap. **14 – 130 weeks** No current work capacity: ► 80% of PIAWE to a maximum of the dollar cap.	2 x State average weekly earnings indexed annually – currently $2050 as at 1 July 2013. There is no dollar cap for total benefits paid.	Payment ceases at 2.5 years (130 weeks) except for workers: ► with no current work capacity and this is not likely to change; and ► with some current work capacity who have returned to work and are working at least 15 hours a week and earning more than $177/week and because of their injury, they are likely to remain physically or mentally incapable of working beyond this level, in any job.	Yes – limited. Workers injured in the course of employment on or after 20 October 1999 may have a right to sue for damages for those injuries. To be entitled to sue at common law, the injury must be "serious" as defined in the legislation. Before any court proceedings claiming damages can be commenced,	A settlement of weekly payments in a lump sum is allowable in some circumstances. There are 3 separate subdivisions for voluntary settlements - each with its own specific eligibility criteria — Part IV, Div 3A. The settlement is only for weekly payments and does not include reasonable medical and like expenses which continue to be paid.

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
	employment. PIAWE can include: ▶ base pay ▶ overtime and shift allowances for the first 52 weeks of weekly payments ▶ piece rates ▶ commissions ▶ monetary value of certain non-pecuniary benefits ▶ value of any salary sacrificed part of salary. Bonuses are not included.	Some current work capacity and returned to work: ▶ 80% of PIAWE to a maximum of the dollar cap and minus 80% of current earnings in a week Some current work capacity and not yet returned to work: ▶ 80% of PIAWE to a maximum of the dollar cap. **130 weeks – retirement** No current work capacity: ▶ 80% of PIAWE to a maximum of the dollar cap if they still cannot work and this is not likely to change. Some current work capacity: ▶ 80% of PIAWE to a maximum of the dollar cap and minus 80% of current earnings in a week if: o a worker has returned to work and is working at least 15 hours a week and earning more than $177/week (indexed annually); and		Normally, the earlier of age 65 or normal retirement age for the worker's occupation except in the following circumstances: ▶ if injured within the period of 130 weeks before attaining retirement age or at any time after attaining that age, the worker is entitled to weekly payments for no more than the first 130 weeks of incapacity for work, or ▶ if worker's incapacity after reaching retirement age relates to an injury suffered within the preceding 10 years and if the incapacity is due to inpatient treatment, the worker is entitled to weekly payments for a limited period of up to 13 weeks.	the degree of impairment arising from the injuries must be assessed and the worker must make an application to the Authority seeking its determination as to whether or not the injury is "serious".	

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
		o because of their injury, they are likely to remain physically or mentally incapable of working beyond this level, in any job.				
Australian Capital Territory	Average pre-incapacity weekly earnings (APWE) means earnings worked out under s 21 (not a contractor) or s 22 (contractor) of the Workers Compensation Act 1951 (ACT). For a non-contractor, the APWE is worked out by taking into account the actual weekly work hours of the worker over a period of up to 1 year before the injury.	**0 – 26 weeks** Totally incapacitated workers – compensation is payable at the worker's average pre-incapacity weekly earnings (APWE). Partially incapacitated workers – compensation is payable calculated as the difference between: ▶ the APWE; and ▶ the average weekly amount that the worker is being paid for working or could earn in reasonably suitable employment. **27 weeks – retiring age + one (1) year for total incapacity** - weekly payments of 65% of the workers APWE or the statutory floor (federal minimum wage decided from time to time by the Australian Industrial	150% of AWE at the time the amount is to be paid.	If the worker was, on the initial incapacity date for the injury, younger than 63 years old, compensation for incapacity is not payable for any period after the worker reaches 65 years of age. If the worker was, on the initial incapacity date for the injury, at least 63 years of age, compensation for incapacity is not payable for any period more than 2 years after the initial incapacity date.	Yes – Unlimited.	Yes, under s 137. Settlement may include pay out of one or more of the following: ▶ weekly incapacity benefits ▶ lump sum compensation for permanent injuries ▶ medical treatment, damage and other costs under part 4.5 of the Act; or ▶ any other amount A payout of weekly compensation may not be assigned, charged or attached, pass to anyone else by operation of the law or have a claim offset against it. Schedule 1 of the Act provides a list of injuries, including for the loss of toes, taste and smell, and sets out a% rate

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
	If the worker was employed by 2 or more employers, the worker's hours from all employment must be taken into account. Where there are difficulties working out fair average pre-incapacity weekly hours - average weekly hours can be worked out by referencing others in the same employment who perform similar work at the same grade as the worker; or other in the same class of employment as the worker, who perform similar work at the same	Relations Commission). **27 weeks – retiring age + one (1) year for partial incapacity.** A sliding scale in the amount of compensation payable is determined by the percentage amount of pre-injury hours worked: ► working less than 25% of hours – 65% ► working between 26 – 50% of hours – 75% ► working between 51 – 75% of hours – 85% ► working more than 85% - 100%.				(from 2% to 100%) of the single loss amount payable.

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
	grade as the worker. Where there was a regular and established pattern of earnings, average earnings may take into account other employment and overtime. Bonuses are not included.					
Queensland	Queensland Ordinary Time Earnings (QOTE) is the seasonally adjusted amount of Queensland full-time adult persons ordinary time earnings as declared by the Australian Statistician in the statistician's report about average	**Total Incapacity** **0 – 26 weeks** For workers under an industrial agreement as defined in s150(1)(a), the greater of: ► 85% of the worker's NWE, or ► amount payable under an award or agreement. For workers not under an industrial agreement, the greater of: ► 85% of the worker's NWE, or ► 80% of QOTE.	The maximum entitlement of compensation payable as weekly payments is $296,165 (from 1 July 2013).	Weekly payments stop when: ► Incapacity stops; or ► 5 years; or ► Maximum dollar cap reached. Medical treatment, hospitalisation and expenses stop when: ► Entitlement to weekly payments ceases.	Yes. For injuries from 15 October 2013 there is a 5% WPI threshold for access to common law damages.	Yes. Settlement of weekly payments cannot occur until weekly payments have been received for two years and the injury is not stable and stationary for the purposes of assessing permanent impairment. The amount cannot exceed 156 x 70% QOTE ($149,615) less any amount already paid to the worker.

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
	weekly earnings published immediately before the start of the financial year. Normal weekly earnings (NWE) are the normal weekly earnings of a worker from employment in the 12 months prior to injury. Overtime is included in the calculation of NWE. Bonuses are included.	For workers on a contract – the greater of: ► 75% of the worker's NWE, or ► 70% of QOTE. 27 – 104 weeks, the greater of: ► 75% of the worker's NWE, or ► 70% of QOTE. **104 – 260 weeks (2 – 5 years)** if DPI more than 15%, the greater of: ► 75% of the worker's NWE, or ► 70% of QOTE. otherwise, the single pension rate. **Partial Incapacity** Weekly payment is an amount calculated by the formula: ► PC = MC x LE/NWE, where: ► PC = weekly rate ► MC = maximum compensation ► LE = loss of earnings.				After a redemption payment has been made the worker has no further entitlement to compensation for the injury, including weekly benefits, and medical and rehabilitation expenses.

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
New South Wales 	Pre-injury average weekly earnings (PIAWE) means the average of ordinary earnings and any overtime and shift allowance payment permitted. Overtime and shift allowance payment only included for first 52 weeks for which weekly payments are payable. Bonuses are not included.	All weekly payments are subject to a deduction (D) for non-pecuniary benefits (if any) provided by the employer to the worker for the benefit of the worker or their family. **0-13 weeks** No current work capacity: ▶ 95% of pre-injury average weekly earnings (PIAWE) minus D; to a maximum of dollar cap minus D. Current work capacity - lesser of : ▶ 95% of PIAWE minus D and minus the greater of current weekly earnings or the amount able to be earned in suitable employment: or ▶ dollar cap minus D and minus the greater of current weekly earnings or the amount able to earned in suitable employment. **14- 130 weeks** No current work capacity: ▶ 80% of PIAWE minus D; to a maximum of dollar cap minus D.	Maximum weekly compensation amount from 1 October 2013 to 31 March 2014 is $1924.30.	Workers subject to a work capacity assessment at least every two years. Payment ceases at 2.5 years (130 weeks) except for workers: ▶ with no current work capacity and this is not likely to change; and ▶ working 15 or more hours per week and earning at least $168 per week and insurer assesses as indefinitely incapable of undertaking further employment to increase their earnings. Payment ceases at 5 years (260 weeks) unless >20% PI and no work capacity (which is likely to continue indefinitely). For all workers benefits cease when they reach	Yes (modified). Known as Work Injury Damages (WID). Dust disease sufferers can pursue common law damages against an employer, occupier and/or supplier in accordance with the *Dust Diseases Tribunal Act 1987* and also continue to receive their statutory benefits under the *Workers' Compensation (Dust Diseases) Act 1942.* No damages for pure mental harm are available to relatives of an injured or deceased worker unless the relative is also a worker under the	Yes, some restrictions. A liability in respect of an injury may be commuted to a lump sum with the agreement of the worker. A commutation brings to an immediate end all future entitlements to weekly benefits, hospital, medical and related treatment and rehabilitation expenses in respect of that injury. A commutation is only available if the following pre-conditions are met: ▶ PI > 15% ▶ PI has been paid ▶ it is more than two years since worker first claimed compensation ▶ rehab and RTW opportunities have been exhausted ▶ weekly benefits have not been stopped or reduced as a result of the worker not complying with their return to work obligations, (section 87EA).

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
		Current work capacity and working less than 15 hours – lesser of: ► 80% of PIAWE minus D and minus the greater of current weekly earnings or the amount able to earned in suitable employment; or ► dollar cap minus D and minus the greater of current weekly earnings or the amount able to earned in suitable employment. Current work capacity and are working 15 or more hours - lesser of: ► 95% of PIAWE minus D and minus the greater of current weekly earnings or the amount able to earned in suitable employment; or ► dollar cap minus D and minus the greater of current weekly earnings or the amount able to earned in suitable employment. After 52 weeks, overtime and shift allowance are excluded from PIAWE. After 130 weeks payments cease for workers with capacity to work		Commonwealth retiring age.	Act.	

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
		who are not working 15 hours or more and earning at least $168 per week. **131 – 260 weeks (and until retirement age for workers with greater than 20% PI who have no work capacity)** No current work capacity as assessed by the insurer and is likely to continue indefinitely to have no current capacity to work, the lesser of: ► 80% of PIAWE minus D; or ► dollar cap minus D. Current work capacity as assessed by the insurer – no entitlement unless: worker applies to the insurer in writing, is working 15 or more hours per week and earning at least $168 per week and insurer assesses as indefinitely capable of undertaking further employment to increase their earnings. The lesser of: ► 80% of PIAWE minus D and minus the greater of current weekly earnings or the amount				

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
		able to earned in suitable employment; or ▶ dollar cap minus D and minus the greater of current weekly earnings or the amount able to earned in suitable employment. **260+ weeks** – payments cease with exceptions – see notes under 'Duration Cap'.				
South Australia	The AWE is the average weekly amount that the worker earned during the period of 12 months preceding the relevant date in relevant employment. Overtime and bonuses are included.	**Total incapacity (no work capacity)** 0-13 weeks – 100% of AWE. 14-26 weeks – 90% of AWE. 27-52 weeks – 80% of AWE. Payments cease unless the worker is assessed as: ▶ having no current work capacity; and ▶ likely to continue indefinitely to have no current work capacity. 53 weeks – retirement (for eligible workers) – 80% of AWE. **Partial incapacity (work capacity)** 0-13 weeks – 100% of AWE less weekly earnings.	Cap of 2 x state average weekly earnings ($2,799.20 as at November 2013). s4(15)(c).	Retirement age subject to a review at least every 2 years. If a worker has a work related injury they will be covered for workers compensation regardless of age. A worker who is within two years of retirement age or above retirement age and who is injured at work is entitled to up to two years of income payments, subject to other provisions of the Workers Rehabilitation and Compensation Act	No.	Yes, with significant restrictions. For redemption of liabilities (weekly payments and/or medical expenses) one of the following legislative criteria for redemption, of weekly payments must be met: ▶ the rate of weekly payments to be redeemed does not exceed $30 (indexed) ▶ the worker is 55 years of age or older and has no current work capacity, or ▶ the Workers Compensation Tribunal has determined on the basis of a joint

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
		14-26 weeks – 90% of the difference between AWE and the greater of actual or deemed weekly earnings. 27-52 weeks – 80% of the difference between AWE and the greater of actual or deemed weekly earnings. No deeming of weekly earnings where: employer fails to provide suitable employment and worker makes reasonable effort or rehab and RTW plan prevents return to employment. Payments cease unless the worker successfully applies for a determination that payments do not cease. Payments continue if WorkCover SA are satisfied that the worker is in employment and that because of the compensable injury, the work is, and is likely to continue indefinitely to be, incapable of undertaking further work to increase earnings. 53 weeks – retirement (for eligible workers) – 80% of the difference		1986. Even after the two years of income maintenance, workers may still be entitled to ongoing medical, hospital, travel and rehabilitation costs and lump sum payments for non-economic loss — s35(2).		application by the worker and the Corporation, that the continuation of weekly payments is contrary to the best interests of the worker from a psychological and social perspective. – s42. Redemptions are voluntary and can only take place through mutual agreement between the parties. In addition the current position of the WorkCover Board is that there should be no redemptions. This policy only applied to injured workers of registered employers where their employer is not self-insured.

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
		between AWE and the greater of actual or deemed weekly earnings.				
Western Australia	For workers whose earnings are not prescribed by an industrial award average weekly earnings (AWE) includes overtime, bonuses and allowances averaged over the year before the disability occurred, up to the dollar cap.	Workers under an industrial award: **0 – 13 weeks** Rate of payments payable under industrial award plus any over-award or service payment paid on a regular basis and overtime, bonuses and allowances paid in the 13 weeks prior to injury, averaged. **14 weeks – onwards** Rate of payments as per 0 – 13 weeks, but not including overtime, bonuses or allowances. Workers not under an industrial award: **0 – 13 weeks** 100 % of AWE, to maximum dollar cap. **14 weeks – ongoing** 85% of AWE, to maximum dollar cap.	Weekly payments capped at $2448.50. Maximum payment is $206,742; an additional amount of up to $155,056 may be ordered where a worker suffers permanent total incapacity and his/her social and financial circumstances justify it.	No retirement provisions in the Act. Age restrictions were removed on 1 October 2011.	Yes – limited.	Lump sum redemption payment for loss of future wages, medical and like expenses, as a result of a permanent total or partial incapacity. Criteria: worker received weekly payments for not less than 6 months, worker and employer agree to redemption and the lump sum amount, the worker will automatically waive their common law rights and the Director of Conciliation Services is satisfied the worker is aware of the consequences of redeeming their claim — s67. Compensation for permanent impairment is also available under Schedule 2 of the Act which lists specific compensable injuries against which a percentage of the prescribed amount is listed.

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STATE	HOW NWE / WEEKLY PAYMENT IS CALCULATED	STATUTORY BENEFIT (% OF PRE-INJURY EARNINGS)	DOLLAR CAP	DURATION CAP	COMMON LAW	SETTLEMENTS
Comcare	Normal weekly earnings = number of hours per week x hourly rate plus allowances other than allowances related to expenses incurred or likely to be incurred. Based on the 2 week period preceding injury. Includes overtime where worked in a regular and established pattern.	**Total incapacity** 0-13 weeks – 100%. 14-26 weeks – 100%. 27-45 weeks – 100%. 46-52 weeks – 75%. 53-105 weeks – 75%. 104+ weeks – 75%.	Maximum - $2134.05 from 15 August 2013 (150% of Average Week Ordinary Time Earnings for Full-time Adults as published by Australian Bureau of Statistics). No dollar cap on total benefits paid.	Compensation is not generally payable to an employee who has reached 65, however if an employee who has reached 63 suffers an injury, compensation is payable for a maximum of 104 weeks (whether consecutive or not) during which the employee is incapacitated — s23.	Yes – limited.	Redemptions of weekly benefits are only available in some circumstances and are calculated per s30(1) (or s137(1) for "former workers") under the *Safety, Rehabilitation and Compensation Act*. Medical, rehabilitation or permanent impairment payments are not affected. A redemption lump sum can only be paid out in lieu of ongoing weekly incapacity payments when a worker's weekly incapacity payments are equal to or less than an indexed amount ($107.74 per week, 1 July 2013) and Comcare is satisfied that the degree of incapacity is unlikely to change. The lump sum payment is calculated by a specified formula.

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MEDICAL AND REHABILITATION

STATE	STATUTORY BENEFIT	DOLLAR CAP	DURATION CAP
Tasmania	A worker is entitled to compensation for reasonable expenses necessarily incurred as a result of the injury (s75(1)(a)).	No limits	Entitlements cease either after 1 year of weekly benefits cessation or 1 year after claim was made. If a worker was entitled to weekly payment in respect of an injury, the workers entitlement to compensation for a medical/hospital/nursing service etc, ceases 52 weeks after the date the claim is made unless the Tribunal makes another decision (s75(1), (2), (2AA), (2AB).
Victoria	All reasonable costs for road accident rescue services, medical, hospital, nursing, personal and household, occupational rehabilitation and ambulance services received because of the injury — s99(1). Reasonable costs is defined in S99AAA(2). For more information go to Chapter 10 of the On-line Claims Manual on WorkSafe's website .	No, but will only fund one type of physical treatment (physio, occupational physio, chiro etc) at a time. A fee schedule of reasonable medical costs applies.	If weekly payments are payable, compensation ceases after 52 weeks after the entitlement to weekly payments ceases. Compensation does not cease if the worker has returned to work but could not remain at work if a service was not provided or surgery is required for the worker or the worker has serious injury or the worker requires modified prosthesis or if the service provided is essential to ensuring that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate – s99AD.
Australian Capital Territory	Medical treatment reasonably received (s70 *Workers Compensation Act 1951*).	No, except on repair or replacement to contact lenses, crutches, prosthesis, spectacles or other artificial aid or damage to clothing: costs are as agreed with the insurer or $676.63 indexed.	No

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STATE	STATUTORY BENEFIT	DOLLAR CAP	DURATION CAP
Queensland	The insurer must pay the cost of the medical treatment or hospitalisation that the insurer considers reasonable having regard to the workers injury. Under the table of costs, WorkCover may impose conditions on the provision of the medical treatment (s210 of the Act). The insurer must pay the costs that it accepts as reasonable, having regard to the relevant table of costs, for medical treatment by a registered person (s211). The Table of costs is published by WorkCover Queensland. The Insurer must pay the fees or costs of rehabilitation that the insurer accepts to be reasonable, having regard to the worker's injury (s222 and s223).	No however insurer's decision on a case by case basis with respect to funding the services. Medical – no limit. Hospital – 4 days (> 4 days if reasonable).	No, however liability stops when the worker's entitlement to compensation stops – s222. An insurer's liability for the cost of hospitalisation at a private hospital extends only to the cost of hospitalisation of the worker as an in-patient at a private hospital for non-elective hospitalisation – not more than 4 days or for non-elective hospitalisation for more than 4 days, to the extent agreed by the insurer under arrangements entered into between the insurer and the worker or someone for the worker before the hospitalisation or any extension of the hospitalisation or for elective hospitalisation – to the extent.
New South Wales	Covers all medical and related treatment and hospital/ ambulance costs. Includes prostheses, allied health provision along with medical provider costs. All costs deemed reasonably necessary. Most medical and related expenses require prior approval. s60, s60A, s61, s62 and 63 of Workers Compensation Act 1987. Fees for many parties covered by fee schedules.	$50 000 for medical and/or related treatments, $50,000 for hospital, and $10,000 for ambulance treatment. Or greater amount prescribed or directed by Workers' Compensation Commission or as pre-approved by insurer.	Entitlements cease 52 weeks from cessation of weekly payments or claim for compensation is made if no payments for weekly compensation are payable. Restriction does not apply to workers with a WPI of over 30%.
South Australia	A worker is entitled to be compensated for reasonable costs (including medical and hospital costs), reasonably incurred in consequence of having suffered a compensable injury — s32.	No, however fees are regulated by the gazette for hospital, medical and allied health services –s32(11) Other costs may be reimbursed if reasonably incurred – s32(1).	No.

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STATE	STATUTORY BENEFIT	DOLLAR CAP	DURATION CAP
Western Australia	Reasonable expenses incurred — s1, clause 17. Limited to 30% of prescribed amount ($62 023). An additional $50 000 can be granted by an arbitrator where the worker's social and financial circumstances justify it — s1, clause 18A(1). If a worker meets an exceptional medical circumstances test and has a WPI of not less than 15%, they may apply for additional medical and related expenses capped at $250 000. Workers granted such an extension are excluded from seeking common law damages — s1, clause 18A.	s1, clause 17. Limited to 30% of prescribed amount ($62 023). An additional $50 000 can be granted by an arbitrator where the worker's social and financial circumstances justify it — s1, clause 18A(1). If a worker meets an exceptional medical circumstances test and has a WPI of not less than 15%, they may apply for additional medical and related expenses capped at $250 000. Workers granted such an extension are excluded from seeking common law damages — s1, clause 18A.	No.
Comcare	Medical treatment at a cost appropriate to that treatment — s16.	No.	No.

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ANNEXURE 7

Current and proposed benefit structure

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ANNEXURE 7: CURRENT AND PROPOSED BENEFITS STRUCTURE

ACRONYMS

AWE — Average weekly earnings as published by the Australian Statistician for Full Time Adult Persons, Weekly Ordinary time earnings for the Northern Territory

GPW — Gross per week

LOEC — Loss of Earning Capacity (NWE(C) less amount can earn in most profitable employment)

LOEC(W) — Loss of Earning Capacity (NWE(C) less amount can earn in most profitable employment; whether or not employment available)

NWE — Injured worker's Normal Weekly Earnings at time of first incapacity as since indexed by movements in AWE

NWE(C) — NWE capped at 250% AWE

PI — Permanent impairment

PILDA — (NT) *Personal Injuries (Liabilities and Damages) Act*

SI — Serious injury / ies

Note: the cap in long term compensation per s65(1B) applies (ie weekly compensation payable at the percentage indicated of the workers LOEC; to a maximum of 150%AWE). Common law claims in the Northern Territory are determine by PILDA. Per PILDA sections 21 and 22, future pecuniary loss is claimable, but discounted.

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TABLE 1: BENEFIT STRUCTURE – CURRENTLY

PERIOD	WEEKLY COMPENSATION	MEDICAL, SURGICAL REHABILITATION	LUMP SUM PERMANENT IMPAIRMENT	LUMP SUM CLOSURE
ALL INJURIES (INCLUDING SI)				
Day 1	Employer excess			
Day 2 – 26 weeks	100% NWE (less any amount actually earned)	Unlimited amount; no duration limit	5% or more WPI, AMA4	Hopkins Agreement
27 – 104 weeks	The lesser of 75% LOEC (no cap on NWE) or 150% of AWE	As above	As above	As above
105 weeks – age 65 / 67	The lesser of 75% LOEC(W) (no cap on NWE); whether or not employment available; or 150% AWE	As above	As above	As above

Note: after 26 weeks of incapacity, maximum weekly compensation of 75% of NWE or 150% of AWE, whichever is the lesser.

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TABLE 2: PROPOSED BENEFIT STRUCTURE: KEY POINTS

- A separate category for SI. SI defined as WPI 15% or greater (assessment on primary injury only).
- All other claims – income maintenance ceases at the 5 year point; and medical and related services will end after the entitlement to income maintenance has ceased for 12 months.
- Option to settle the claim for a lump sum.

PERIOD	WEEKLY COMPENSATION	MEDICAL, SURGICAL REHABILITATION	LUMP SUM PERMANENT IMPAIRMENT	LUMP SUM CLOSURE
Day 1	Employer excess			
ALL INJURIES (INCLUDING SI)				
Day 2 – 26 weeks	100% NWE (less any amount actually earned)	No cap; but duration limit 52 weeks after weekly payments cease	5% or more WPI, AMA5	Negotiated agreement; assessment similar to ss 21 and 22 PILDA
27 – 104 weeks	The lesser of 75% LOEC (NWE capped at 250% of AWE) ; or 150% AWE	As above	As above	As above
105 – 260 weeks	The lesser of 75% LOEC(W) (NWE capped at 250% of AWE); or 150% AWE	As above	As above	As above
SI ONLY				
261 weeks to retirement	The lesser of 75% LOEC(W) (NWE capped at 250% of AWE); or 150% AWE	As above	As above	As above

Note: after 26 weeks of incapacity: NWE is deemed to be 250% of AWE or the worker's actual NWE, whichever is the lesser; and maximum weekly compensation is 75% of NWE or 150% of AWE, whichever is the lesser.

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EXAMPLE 1, NWE = $2,000 (AWE = $1,449.30; 150% AWE = $2,173.95; 250% AWE = $3,623.25)

	WEEKLY PAYMENT TO WORKER / BENEFIT PAYABLE
Day 2 – 26 weeks: 100% of NWE	$2,000 gpw
Week 27 – 104 weeks: can earn $1,000 pw in most profitable employment: 75% x ($2,000 - $1,000)	$750 gpw
Week 105 – 260 weeks: can earn $1,500 pw in most profitable employment, whether or not employment available	$375 gpw
PI less than 15%; at 260 weeks	Entitlement to weekly compensation ends. Medicals end 52 weeks later
PI 15% or more	$375 gpw, to retirement subject to further assessment of earning capacity; lifetime medical care

EXAMPLE 2, NWE = $8,000 GPW (AWE = $1,449.30; 150% AWE = $2,173.95; 2.5 X AWE = $3,623.25)

	WEEKLY PAYMENT TO WORKER / BENEFIT PAYABLE
Day 2 – 26 weeks: 100% of NWE	$8,000 gpw
Week 27 – 104 weeks: assume can earn $500 pw in most profitable employment: 75% x $3,623.25 (NWE(C) capped at 250% AWE) - $500 = $2,342.44 gpw; benefit capped at 150% AWE	$2,173.95 gpw
Week 105 – 260 weeks: can earn $1,000 pw in most profitable employment, whether or not employment available	$1,967.44 gpw
PI less than 15%; at 260 weeks	Entitlement to weekly compensation ends. Medicals end 52 weeks later
PI, 15% or more:	$1,967.44 gpw to retirement subject to further assessment of earning capacity; lifetime medical care

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ANNEXURE 8

Practice Direction 6

61. Practice Direction No 6 of 2009 - Trial Civil Procedure Reforms

Part 1 – Application

1. Unless otherwise ordered by a Judge, this Practice Direction applies to all civil proceedings commenced by writ (other than a writ of habeas corpus) or by Originating Motion where the Court has ordered that the proceeding continue as if by writ or has ordered pleadings in accordance with O.4.07 pending in the Supreme Court on 1 January 2010 (the commencement date) or commenced thereafter.

2. Pursuant to O.48.28, this Practice Direction is to apply until 31 December 2010.

Part 2 – Pre-action Conduct

3. The objectives of this part are:

   3.1 to encourage the exchange of early and full information about a prospective legal claim;

   3.2 to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings;

   3.3 to support the efficient management of proceedings where litigation cannot be avoided.

4. Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include:

   4.1 the plaintiff writing to give details of the claim;

   4.2 the defendant acknowledging the claim letter promptly;

   4.3 the defendant giving within a reasonable time a detailed written response; and

   4.4 the parties conducting in good faith genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.

5. If there are circumstances which require a plaintiff to commence proceedings before complying with this part, the parties should endeavour to comply with the spirit of this part as soon as reasonably possible after proceedings have commenced.

   Note: For example, urgent applications to the Court for injunctions, or to avoid the action becoming statute barred, might excuse non-compliance.

6. The plaintiff 's letter should:

6.1 give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;

6.2 enclose copies of the essential documents on which the plaintiff relies and any documents (except privileged documents) which might significantly impair the plaintiff's case;

6.3 ask for a prompt acknowledgement of the letter, followed by a full written response within a reasonable stated period;

(For many claims, a normal reasonable period for a full response may be one month.)

6.4 state whether court proceedings will be issued if the full response is not received within the stated period;

6.5 identify and ask for copies of any essential documents, not in the plaintiff's possession, which the plaintiff wishes to see;

6.6 state (if this is so) that the plaintiff wishes to enter into mediation or another alternative method of dispute resolution; and

6.7 draw attention to the Court's powers to impose sanctions for failure to comply with this Practice Direction and, if the recipient is likely to be unrepresented, enclose a copy of this Practice Direction.

7. The defendant should acknowledge the plaintiff's letter in writing within 14 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the plaintiff, the defendant should give reasons why a longer period is needed.

8. The defendant's full written response should as appropriate:

8.1 accept the claim in whole or in part and make proposals for settlement; or

8.2 state that the claim is not accepted.

9. If the claim is accepted in part only, the response should make clear which part is accepted and which part is not accepted.

10. If the defendant does not accept the claim or part of it, the response should:

10.1 give detailed reasons why the claim is not accepted, identifying which of the plaintiff's contentions are accepted and which are in dispute;

10.2 enclose copies of the essential documents on which the defendant relies, and any documents (except privileged documents) which significantly impair the defendant's case;

10.3 enclose copies of documents asked for by the plaintiff, or explain why they are not enclosed;

10.4 identify and ask for copies of any further essential documents, not in the defendant's possession, which the defendant wishes to see; and

(The plaintiff should provide these within a reasonably short time or explain in writing why he is not doing so.)

10.5 state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.

11. The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the plaintiff and defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the Court may have regard to such conduct when determining costs.

12. Subject to any order of the Court documents disclosed by either party in accordance with this Practice Direction may not be used for any purpose other than resolving the dispute or any subsequent proceeding relating to the dispute, unless the other party agrees.

13. If, in the opinion of the Court, non-compliance with this Part has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to delay or costs being incurred in the proceedings that might otherwise not have been incurred, the orders the Court may make include:

13.1 an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;

13.2 an order that the party at fault pay those costs on an indemnity basis;

13.3 if the party at fault is a plaintiff in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;

13.4 if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in

respect of such period as may be specified at a higher rate than the rate at which interest would otherwise have been awarded.

Part 3 – Case Management Conferences

14. The purpose of this part is to ensure that proceedings are the subject of active and effective judicial case management such that the real issues of substance which are in dispute between the parties, and only those issues, are resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute. The parties and their representatives must assist the Court in managing cases to achieve this end.

15. Parties or their representatives should attend all case management conferences:

    15.1 with an understanding of the nature of the real issues of substance which are in dispute between the parties and of their case in relation thereto;

    15.2 having considered, discussed and if possible agreed with the other party the directions they propose that the court should make at that hearing;

    15.3 with sufficient information concerning the availability of all relevant persons to enable a trial date or trial window to be fixed if the fixing of trial dates or a trial window has not already occurred;

    15.4 ready to deal with all outstanding procedural issues.

16. Case management conferences may be conducted by telephone.

17. At the case management conference, the Court will:

    17.1 fix a trial date or a trial window, if that has not already been done;

    17.2 make directions to ensure that the matter is ready for trial on that date or in that window;

    17.3 scrutinise carefully the parties' respective pleadings to ensure that they properly identify, and only identify, the real issues of substance which are in dispute between the parties;

    17.4 consider whether any claim or plea is appropriate for summary determination, strike out or determination as a preliminary issue;

    17.5 resolve any other outstanding procedural issues between the parties or, if that is not possible, to make directions for their resolution;

    17.6 consider whether any further case management conferences are likely to be required and if so to fix the date or dates for those

conferences. The parties are to co-operate to avoid as far as possible multiple case management conferences in any one matter;

17.7 make such other orders as it considers appropriate to ensure that the matter is resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute.

18. Whilst this Practice Directions remains in force, Rules 48.16, 48.17, 48.18 and 48.19 shall not apply to proceedings which are subject to this Practice Direction.

Part 4 – Trial Dates are Sacrosanct

19. All parties and their representatives must appreciate that:

19.1 the public has an interest in ensuring that all disputes are determined justly, promptly, economically, and in proportion to the nature of the dispute;

19.2 it is essential for determining disputes in this way that trial dates are taken seriously and assumed by the parties and their representatives to be immutable.

20. The Court will not vacate a trial date or trial window save in extra-ordinary circumstances which render a fair trial impossible and then only as a last resort after all other options have been exhausted.

21. Any party who considers that circumstances have arisen which may mean that the trial will not be able to proceed on the date or dates fixed for trial should immediately notify the Court and the other party, and take out an application for directions.

Part 5 – Discovery

22. In exercising its case management powers referred to under Part 3 above, the Court will make an order under r.29.05 dispensing with the requirement for discovery under r.29.02 (save for ongoing discovery of the documents referred to in paras 6.2 and 10.2 of this Practice Direction) unless it is satisfied that:

22.1 discovery should be limited to particular documents or class of documents, in which case it will make an order under r.29.05 to that effect;

22.2 discovery under r.29.02 is necessary to resolve the real issues of substance which are in dispute between the parties justly, promptly, economically, and in proportion to the nature of the dispute.

Part 6 – Offers of Compromise

23. At any time, including before proceedings have been commenced, a party may make an offer, open or without prejudice save as to costs (an "Offer of Compromise"), to settle some or all of the issues in the proceedings.

24. If the Offer of Compromise is not accepted within a reasonable time and that issue or those issues are determined by the Court in a way which is more advantageous for the party who made the Offer of Compromise than if the Offer of Compromise had been accepted, the Court will take that into account when considering:

    24.1 the exercise of its discretion as to costs under r.63.03;

    24.2 the exercise of its discretion in relation to interest under s 84 of the Supreme Court Act.

25. In the ordinary case, the Court is likely to require the party who declined but then failed to better the Offer of Compromise to pay the other party's costs from the date the Offer of Compromise could reasonably have been accepted on an indemnity basis. If the Offer of Compromise was made by a plaintiff seeking a money judgment, the Court will normally order the defendant to pay interest at an enhanced rate from the date the Offer of Compromise could reasonably have been accepted. If the Offer of Compromise was made by a defendant defending a claim for a money judgment, the Court will normally decline to order the defendant to pay interest from the date the Offer of Compromise could reasonably have been accepted.

26. The parties' attention is drawn to their duty to disclose the nature of their case under Part 2 above and to the importance of compliance with this duty to ensure that the other party has a sufficient understanding of the case against it to make a considered judgment about whether or not to accept, or to make, an Offer of Compromise. Failure to comply with this duty is likely to mean that the Court will not take into account when considering the exercise of its discretion as to costs or interest any Offer of Compromise made whilst the offering party was in breach of this duty.

Part 7 – Costs and Interest

27. The Court will take into account, amongst other matters, whether a party has complied with its duties under the Rules and further this Practice Direction when considering:

    27.1 the exercise of its discretion as to costs under r.63.03;

    27.2 the exercise of its discretion in relation to interest under s 84 of the Supreme Court Act.

28. Notwithstanding O.63.74, where the Court decides that a party has failed to comply with its duties under the Rules and this Practice Direction, the

Court may award interest on costs at a rate not exceeding the rate fixed by the Rules, plus 8 %.

29. The Court may order costs as well as interest in accordance with para 28 against a practitioner where it is established that the practitioner has failed to take reasonable steps to ensure that the client has complied with the duties under the Rules and this Practice Direction. Where there has been a significant departure from the Rules or this Practice Direction, as a general rule the Court will seek an explanation from the practitioner concerned as to why this has occurred.

30. For the avoidance of doubt, for the purposes of O.63, the costs of a proceeding include the costs of complying with this Practice Direction.

11 June 2009

(Note – Para 29 amended pursuant to Practice Direction No 10 of 2009)

EXPLANATORY DOCUMENT FOR PRACTICE DIRECTION NO 6 OF 2009

TRIAL CIVIL PROCEDURE REFORMS

1. Alongside and following the Woolf civil justice reforms in England and Wales in the late 1990s, major civil procedure reforms have been underway in common law jurisdictions around the world. In 1999, Queensland brought in its new Uniform Civil Procedure Rules. The next decade saw the Court Procedures Act 2004 in the Australian Capital Territory, the Civil Procedure Act 2005 and the Uniform Civil Procedure Rules 2005 in New South Wales, the new Supreme Court Rules 2006 in South Australia, the experimental “Rocket Docket” system in the Federal Court in 2007 and, this year, the implementation of the Hong Kong Civil Justice Reforms. The radical proposals of British Columbia’s Civil Justice Reform Working Group including for the establishment of “information/assistance hubs” still remain under consideration. The report of Sir Rupert Jackson’s committee on the costs of civil litigation in England and Wales is awaited with interest.

2. Given that our Rules are modelled on the Victorian Supreme Court Rules, of significance for the Northern Territory is the recent Victorian Law Reform Commission’s Report on Civil Justice Reform (Report 14, July 2008). Following its wide ranging review of the Victorian civil justice system the committee made 177 recommendations.

3. The motivation for these reforms is the fact that traditional civil litigation takes too long and is too expensive. Delays and inefficiencies impose substantial avoidable costs and other pressures on litigants.

4. In 2008, the Judges appointed Mildren J to chair a committee comprised also of Riley J and representatives of the Northern Territory Bar Association and the Law Society of the Northern Territory to consider and make recommendations on civil procedure reform to the annual Judge’s Conference in May this year.

5. That committee recommended the introduction of the following as a first step in the reform of civil procedure in the Northern Territory Supreme Court:

   5.1 All parties are to be under a general obligation to disclose the nature of their respective cases and to attempt to settle the dispute prior to commencing litigation;

   5.2 Litigation, once commenced, is to be the subject of active and effective judicial case management such that the real issues of substance which are in dispute between the parties, and only those issues, are resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute. This will include the fixing of trial dates or trial windows at the earliest opportunity;

5.3 The parties and their representatives are to be under a duty to assist the Court in managing cases to achieve this end;

5.4 The ambit of discovery is to be subject to review in every case, with the presumption being in favour of limiting or excluding discovery wherever appropriate;

5.5 The role of offers made "without prejudice save as to costs" is to be enhanced to encourage parties to make and accept reasonable offers of settlement, including offers made prior to the commencement of court proceedings;

5.6 Greater weight is to be placed on a party's conduct in these respects both during and before the commencement of litigation when awarding costs and interest.

6. The purpose of these reforms is to maximise the prospect of settling a dispute without incurring the costs of court proceedings. However, if the dispute is not settled and resort to court process is necessary, these reforms should also ensure that each party has a sufficient understanding of its own case and the case against it:

6.1 to make a reasonably accurate assessment of its prospects of success in securing or resisting a remedy at trial;

6.2 to make a reasonably accurate assessment of the likely time and cost involved in getting to trial;

6.3 to make a reasonably accurate assessment of the most appropriate offer (if any) to make "without prejudice save as to costs";

6.4 to discharge its duty to assist the Court to manage the case such that the real issues of substance which are in dispute between the parties, and only those issues, are resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute.

7. Further, by active case management with the support of better informed parties under a duty to assist the court, the committee and the Judges believe that the costs of and the delays in litigation will be significantly reduced.

8. Finally, the Court is expressly empowered to take into account a party's compliance with these reforms in the conduct of litigation when awarding costs and interest.

9. The Judges have accepted the committee's recommendations and the draft Practice Direction produced it to give effect to their recommendation.

10. These reforms have been identified by the committee and adopted by the Judges now on the basis that (a) their implementation is likely to

result in immediate improvements in the administration of civil justice and (b) they are likely to be part of the new system once the reform process has been concluded. It is in this sense that this Practice Direction is described as a “trial”. It would be wrong to assume that these particular reforms themselves are necessarily provisional.

11. Alongside monitoring these reforms, the Judges have asked Mildren J and his committee to continue their inquiry into civil procedure reform with a view to making further recommendations in relation to the Supreme Court.

11 June 2009

ANNEXURE 9

Objects of legislation

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ANNEXURE 9: OBJECTS OF LEGISLATION

QUEENSLAND	*WORKERS' COMPENSATION AND REHABILITATION ACT* 2003

5 Workers' compensation scheme

1) This Act establishes a workers' compensation scheme for Queensland:

   a) Providing benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death, for persons other than workers, and for other benefits; and

   b) Encouraging improved health and safety performance by employers.

2) The main provisions of the scheme provide the following for injuries sustained by workers in their employment:

   a) Compensation;

   b) Regulation of access to damages;

   c) Employers' liability for compensation;

   d) Employers' obligation to be covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self-insurer;

   e) Management of compensation claims by insurers;

   f) Injury management, emphasising rehabilitation of workers particularly for return to work;

   g) Procedures for assessment of injuries by appropriately qualified persons or by independent medical assessment tribunals;

   h) Rights of review of, and appeal against, decisions made under this Act.

3) There is some scope for the application of this Act to injuries sustained by persons other than workers, for example:

   a) Under arrangements for specified benefits for specified persons or treatment of specified persons in some respects as workers; and

   b) Under procedures for assessment of injuries under other Acts by medical assessment tribunals established under this Act.

4) It is intended that the scheme should:

   a) Maintain a balance between:

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	i. providing fair and appropriate benefits for injured workers or dependants and persons other than workers; and ii. ensuring reasonable cost levels for employers; and b) Ensure that injured workers or dependants are treated fairly by insurers; and c) Provide for the protection of employers' interests in relation to claims for damages for workers' injuries; and d) Provide for employers and injured workers to participate in effective return to work programs; and (da) Provide for workers or prospective workers not to be prejudiced in employment because they have sustained injury to which this Act or a former Act applies; and e) Provide for flexible insurance arrangements suited to the particular needs of industry. 5) Because it is in the State's interests that industry remain locally, nationally and internationally competitive, it is intended that compulsory insurance against injury in employment should not impose too heavy a burden on employers and the community.

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VICTORIA	*ACCIDENT COMPENSATION ACT* 1985, SECTION 3, OBJECTS OF THE ACT
	The objects of this Act are: a) To reduce the incidence of accidents and diseases in the workplace; b) To make provision for the effective occupational rehabilitation of injured workers and their early return to work; c) To increase the provision of suitable employment to workers who are injured to enable their early return to work; d) To provide adequate and just compensation to injured workers; e) To ensure workers compensation costs are contained so as to minimise the burden on Victorian businesses; f) to establish incentives that are conducive to efficiency and discourage abuse; g) To enhance flexibility in the system and allow adaptation to the particular needs of disparate work situations; h) To establish and maintain a fully-funded scheme; i) In this context, to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation.

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TASMANIA	*WORKERS REHABILITATION AND COMPENSATION ACT* 1988, SECTION 2A
	The objects of this Act are to establish a rehabilitation and compensation scheme for workplace injuries that: a) Provides for the prompt and effective management of workplace injuries in a manner that promotes and assists the return to work of injured workers as soon as possible; and b) Provides fair and appropriate compensation to workers and their dependants for workplace injuries; and c) Assists in securing the health, safety and welfare of workers and in reducing the incidence of workplace injuries; and d) Provides an effective and economical mechanism for resolving disputes relating to the treatment and management of, and compensation in relation to, workplace injuries; and e) Is efficiently and effectively administered; and f) Is fair, affordable, efficient and effective.

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SOUTH AUSTRALIA	***WORKERS REHABILITATION AND COMPENSATION ACT*** **1986**
	Objects of Act 1) The objects of this Act are: a) To establish a workers rehabilitation and compensation scheme: i. that achieves a reasonable balance between the interests of employers and the interests of workers; and ii. that provides for the effective rehabilitation of injured workers and their early return to work; and iii. that provides fair compensation for employment-related injuries; and iv. that reduces the overall social and economic cost to the community of employment-related injuries; and v. that ensures that employers' costs are contained within reasonable limits so that the impact of employment-related injuries on South Australian businesses is minimised; and b) To provide for the efficient and effective administration of the scheme; and c) To establish incentives to encourage efficiency and discourage abuses; and d) To ensure that the scheme is fully funded on a fair basis; and e) To reduce the incidence of employment-related accidents and injuries; and f) To reduce litigation and adversarial contests to the greatest possible extent. 2) A person exercising judicial, quasi-judicial or administrative powers must interpret this Act in the light of its objects without bias towards the interests of employers on the one hand, or workers on the other. 3) The Corporation, and the employer from whose employment a compensable injury arises, must seek to achieve an injured worker's return to work (taking into account the objects and requirements of this Act).

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ANNEXURE 10

Bibliography

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ANNEXURE 10: BIBLIOGRAPHY

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