

Workplace Injury Rehabilitation and Compensation Amendment (WorkCover Scheme Modernisation) Bill 2023

Master Builders Victoria Submission

1. Executive Summary

Master Builders Victoria (MBV) is the leading voice and representative of the Victorian building and construction industry. We acknowledge that the Victorian Workcover system is fundamentally broken and that the Government is seeking to make changes that will create a sustainable system.

MBV supports the bill's intent to create a sustainable system. However, MBV is concerned about the rushed nature of the content, especially considering the six-month lead time since its announcement earlier this year. The lack of adequate consultation with business and industry bodies is disappointing, and MBV believes that a more comprehensive approach, focusing on stronger claim evaluation and early intervention for return to work, could yield greater benefits.

The building and construction industry continues to face unique economic challenges. In highlighting the significance of inclusive adjustments for small businesses, MBV raises concerns regarding the potential substantial impact of the proposed changes on premiums. This impact, illustrated by businesses experiencing a two-year escalation in premiums, emphasises the need for careful consideration to support building and construction businesses.

In this submission, MBV highlights the longstanding issue of WorkSafe recoveries against third parties. This is causing delays in premium reduction and escalating Public Liability premiums and excess. MBV urges the consideration of a more focused approach to reduce claim costs and durations. The construction industry faces specific challenges that must be addressed.

While appreciating the proposed 20 per cent impairment test, MBV advocates for a more robust threshold, in line with South Australia's approach. Concerns about dispute rights and potential shifts to common law damages due to the 20 per cent Whole Person Impairment (WPI) threshold are brought to attention.

MBV strongly recommends the removal of the amendment allowing broader information sharing by WorkSafe, citing potential legal concerns and hindrances to knowledge sharing. Addressing resource challenges and ensuring clear definitions in mental health claims are pivotal for effective policy implementation. Overall, MBV asserts that a balanced and clear approach is crucial for successfully executing the proposed WorkCover scheme changes.

2. About Master Builders Victoria (MBV)

MBV represents over 6000 stakeholders from across the building and construction industry. They range from large and small builders, tradespeople across the domestic and commercial sectors, and apprentices, suppliers and manufacturers.

The building and construction industry is one of the most important sectors of the Victorian economy. Our industry is the third-largest full-time employer in Victoria and supports 126,370 businesses, more than every other sector of the economy. The overwhelming majority of these businesses (98.8 per cent) are small, with less than 20 employees.

Building and construction activity has one of the largest multiplier effects on the economy. This is because the structure of activity requires high domestic content for our industry's inputs, such as building materials, labour, and professional services. As a result, it is estimated that every \$1 million spent on residential building activity delivers \$3 million worth of economic activity.

Our sector delivers housing, parks, infrastructure, schools, hospitals, and other important amenities for the liveability of all Victorians, critical to our community's well-being and the state's future prosperity.

3. Impact on the construction industry

MBV recognises the need to adapt the WorkCover scheme to align with its intended purpose, emphasising that such changes should be inclusive and supportive of all stakeholders, especially small businesses. The proposed alterations raise concerns about their potentially significant impact on premiums, which could have widespread repercussions for employment considerations and the overall structures of smaller to medium-sized businesses.

The construction industry has already felt the consequences of the recent increase in premiums earlier this year. One member case study involves a larger business whose ongoing viability was influenced by the substantial rise in their annual WorkCover premium. Over two years, the premium escalated from 4.92 per cent (FY 21-22) to 8.63 per cent (FY 23-24) of remuneration, reaching \$860,000. Against the backdrop of the challenges within the construction sector in recent years, these escalating premiums could potentially serve as the tipping point, exacerbating existing difficulties.

The persistent issue of WorkSafe recoveries against third parties, such as host employers and principal contractors, remains a longstanding concern. The recovery process hinges on proving negligence by the third party, presenting a challenge when claims are accepted on a no-fault basis, especially as project records may have been archived or disposed of over the years.

Moreover, as a direct consequence of the cost recovery process, there is a subsequent rise in Public Liability premiums and excess. Insurance brokers report a significant increase in insurance excess, moving from \$10,000 - \$50,000 per claim to \$100,000 - \$250,000. The cost recovery, unfortunately, often falls short of compensating for this increased excess, effectively compelling employers to assume a self-insurance stance.

MBV underscores the urgent need for a more focused approach to reduce the cost and duration of claims. Despite a decline in the number and frequency of claims, there is a growing concern about the annual increase in

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median time lost and compensation paid since 2008-09. These challenges are particularly impactful within the construction industry and warrant careful consideration in policy adjustments.

4. Proposed changes to eligibility to weekly payments after 130 weeks

MBV welcomes the proposed introduction of a 20 per cent impairment test. However, MBV believes this could be higher. South Australia sets a precedent for this, where the degree of permanent impairment of the worker with a physical injury must be at least 35 per cent, and 30 per cent for a psychiatric injury. This is determined at two years on the scheme.

While the changes address certain concerns, such as the need for a 20 per cent whole person impairment (WPI) threshold, the Bill is silent on a worker's right to dispute interim determinations, leaving room for further clarification. The possibility of workers pursuing common law damages if they lose their entitlements due to the 20 per cent WPI threshold for weekly compensation after 130 weeks is also underscored.

MBV highlights the need for a more robust approach to enhance the WorkCover scheme's financial sustainability. The proposed changes may require further adjustments to strike a balance between financial sustainability and fair compensation for injured workers.

5. Information Sharing

MBV strongly urges the removal of the proposed amendment allowing information obtained by WorkSafe under the WIRC Acts to be used for its functions under any other Act. This recommendation is grounded in the concern that legal protections will not be universally afforded to all parties involved in administering WorkCover claims under this proposal. The broadening of information sharing will lead to increased lawyers' engagement, and inhibit the sharing of learnings.

The WIRC Act 2013 contains specific provisions (section 552) that information related to those Acts could be used only to administer those two particular Acts. This ensured that WorkSafe Investigators could not access information contained within workers' compensation claims to inform prosecution.

Information attained by WorkSafe and its Agents as part of the administration of WorkCover claims (i.e. Under the AC or WIRC Acts), including circumstance investigations, witness statements taken by claims investigators where people are not informed of their legal rights, medical information (with limits), rehabilitation reports, weekly payment details etc. has never been accessible to WorkSafe for the purpose of its administration of the OHS Act 2004.

For the enforcement side of WorkSafe to have access to information obtained from workers' compensation claims is a concern. If this changes, information obtained during this process will need to be with the understanding that any statements made could be potentially used in a court of law for a criminal matter under the OHS Act. This will lead to a reduction of claims or earlier workplace returns.



6. Mental Health Reform and Workplace Factors

MBV calls for greater discernment between injury factors related to the workplace and those that are non-work related. Specific suggestions include exclusions for mental injuries caused by work-related stress or burnout and considerations for other carve-outs, such as workplace interpersonal relations.

MBV argues that clear definitions of terms are essential for successfully implementing the Bill. The Bill introduces a new requirement that mental injuries must predominantly arise out of or in the course of employment, making employment the predominant cause of the claimed mental injury. However, the term "predominant" is not defined, and it is suggested that its ordinary meaning, referring to the strongest or largest contributing factor, be adopted.

Additionally, the requirement of a predominant cause also extends to mental injuries that are a recurrence, aggravation, acceleration, exacerbation, or deterioration of any pre-existing injury or disease, replacing the previous significant contribution test. MBV emphasises the need for clarity in understanding what constitutes a "predominant cause." The exclusion of injuries predominantly caused by stress or burnout arising from usual or typical work-related events is welcomed. However, we have concerns if work-related stress and burnout are not defined. MBV strongly advocate for explicit definitions to avoid ambiguity.

Overall, the MBV underscores the necessity of clear and comprehensive definitions for the proposed changes to be effective and easily understood by both businesses and employees.

7. Resource Challenges

Early intervention is crucial in returning injured workers to the workplace. Anecdotally, the engagement of an independent medical examiner (IME) has had the greatest role in determining the initial and ongoing liability on a claim and informing the management of RTW plans. Mental injury claims prove to be more difficult for workers to return to work. Access to an IME should be prioritised to review the eligibility of claims and facilitate early intervention.

WorkCover agents are not resourced to respond to claims within legislated timeframes. Members have sought advice in instances where claims are accepted without consideration of whether there were other factors in play, including whether there was a potential cause that was not work-related, or a claim was being made without merit.

There was an instance where an IME was engaged but could not perform their function before the 28-day timeframe given to agents to accept a claim. The subsequent evaluation and termination of the claim at a later date caused additional harm to the worker's mental health.

Skill shortages pose a significant concern across Australia, affecting various sectors, including WorkSafe agents and Independent Medical Examiners (IMEs). The shortage of qualified personnel in these fields reflects a broader issue where there are not enough resources to meet the growing demand. This shortage may impact the efficiency and responsiveness of WorkSafe agents and IMEs, potentially hindering their ability to keep pace with the demands and responsibilities associated with their roles.

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Enhancing transparency in the process and extending the evaluation period could be instrumental in managing expectations more effectively. An approach similar to provisional payments, specifically for workers with mental injury claims older than 28 days, could involve providing access to weekly payments until an Independent Medical Examination can be conducted.

MBV recommends that any impact on the employer's premium should only take effect if the claim is accepted after review on an IME. This approach ensures a fair and cautious management of cases involving mental injury claims and aligns with the principle of withholding premium adjustments until the legitimacy of the claim is established.

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