



**Victorian Workers'
Compensation System:
Independent Review
into the Agent Model
and the Management of
Complex Claims**

Discussion Paper
August 2020

Glossary

Agents – WorkSafe delegates most of its claims management and premium collection functions to agents. There are currently five agents who administer the claims management function on behalf of WorkSafe. The agents, which are contracted by WorkSafe are Allianz, CGU, Gallagher Bassett, EML Vic Pty Ltd and Xchanging.

Complex claims – for the purposes of this discussion paper, complex claims are defined as claims that progress beyond 130 weeks.

Independent Medical Examiner (IME) – appointed by WorkSafe under the WIRC Act to examine injured workers and provide an opinion about their condition, work capacity and treatment. Agents engage IMEs to provide an independent opinion on a worker's injury or capacity.

Injury – includes any physical or mental injury, and also includes a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease (WIRC Act, s 3).

Medical and like expenses – the reasonable cost of any medical and related treatment, hospital treatment and rehabilitation services that are deemed reasonably necessary and required as a result of a workplace injury.

WIRC Act – the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

WorkCover – the Victorian Workers' Compensation Scheme.

Worker – an individual who performs work for an employer; or agrees with an employer to perform work. This work is carried out at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise; or is deemed to be a worker under the WIRC Act (WIRC Act, s 3).

WorkSafe – the Victorian WorkCover Authority, which is the State Government authority responsible for overseeing the workers' compensation scheme and administering the WIRC Act.

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1. Conduct of the review

1.1 Overview

The Victorian Government has commissioned me, Peter Rozen QC, to conduct an independent review (the Review) into the management of complex workers' compensation claims by WorkSafe agents. The Review responds to recommendation 1 of the Victorian Ombudsman's follow up report into complex workers' compensation claims, published in December 2019.¹ The Ombudsman recommended an independent review of the agent model.

The Terms of Reference for the Review were released by the Minister for Workplace Safety, the Hon. Jill Hennessy MP, on 26 June 2020.

I have been appointed to lead the Review, supported by the Department of Justice and Community Safety.

I am releasing this discussion paper to assist individuals and organisations to provide targeted written submissions to inform the Review's recommendations. I will also be seeking information relevant to my Terms of Reference in less formal ways, such as talking directly to interested individuals and organisations, a process which I have already commenced.

In sections 2–3 of the paper I provide some detail of the agent model and complex claims management, including potential issues with the current system. In section 4 I ask some questions which may guide your response to the discussion paper.

1.2 Terms of Reference

The full Terms of Reference for the Review are at Appendix A. The following is a summary of key elements:

The Review will investigate the adequacy, suitability and effectiveness of the agent model in managing complex WorkCover claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act). The Review will determine how and by whom complex claims should be managed to achieve optimal outcomes for injured workers, having regard to the need to maintain the financial viability of the scheme.

For the purposes of the Review, complex claims are defined as those where an injured worker has received 130 weeks or more of weekly payments. In addition to the

¹ Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (December 2019).



management of complex claims, the Review will also consider the personal circumstances of injured workers that may contribute to claims becoming 'complex'.

In making its findings and developing recommendations, the Review should inquire into:

- a. Whether the agent model is effective in delivering and achieving positive health and recovery outcomes, including prompt, effective and proactive treatment and management of injuries.
- b. Whether case management processes and practices for complex claims reflect best practice and provide tailored treatment and support based on biopsychosocial factors,² individual circumstances and medical advice.
- c. Whether policy, oversight and governance arrangements, including financial and performance incentives support and promote best practice, timely, sustainable and quality decision making by agents.
- d. Any other matters that the Reviewer deems necessary, including any potential system wide implications.
- e. The implications of retaining, limiting or removing agents from performing claim management functions on behalf of WorkSafe.

In forming its recommendations, the Review must have regard to the implications of any impact on the financial viability of the workers' compensation scheme and the cost of WorkCover insurance for employers.

1.3 How the Review will gather evidence

Written submissions will form part of the broader consultation process. I intend to hold meetings with both relevant individuals and groups so that I can consider the full range of perspectives.

At this time, I am seeking formal written submissions. I, or supporting Review team staff, will also speak with people individually and in groups through a program of targeted consultations. To ensure the Review is informed by the experiences of a wide range of interested people, I will conduct targeted consultation with people including:

- peak representative bodies and organisations; and
- participants directly involved in the workers' compensation scheme, such as injured workers and health care providers.

² An individual's biological/genetic, psychological and social factors (and the interactions between them) are known as biopsychosocial factors.



A list of interested individuals and organisations identified to date is contained at Appendix C. I welcome any suggestions about other people to whom I should speak.

You can have your say by:

- contacting the Review team to speak with us about your experience. You can reach us at agentreview@justice.vic.gov.au.
- making a formal submission addressing any or all of the questions in this paper. Submissions should be made by emailing the Review team at agentreview@justice.vic.gov.au.

Submissions must be received no later than 21 September 2020, to ensure your feedback can be considered by the Review team.

I plan to conduct further consultation throughout the Review.

1.4 Call for written submissions

What to submit

Submissions are your ideas or opinions about the agent model and the management of complex claims and how to improve the system.

I have prepared 28 questions listed at section 4, that seek to guide submissions. You may answer as many or as few of the questions as you like. Where possible, you should refer to examples and provide material, such as data and documents, to support the views in your submission. This may be anything from a personal story to a research paper. It is all valuable.

The feedback received will be used to help inform my recommendations about the agent model and the management of complex claims.

The questions in this discussion paper are a guide only, and feedback is sought on any relevant issues within the Terms of Reference.

How is your submission used?

Submissions will help me understand different views and experiences about the agent model and the management of complex claims. I will use the information I receive in submissions and consultations, along with other research, to develop recommendations and write my report for the Minister. I will not consider submissions on matters outside the Terms of Reference.



How to make a submission

You can make a submission in writing, or verbally to one of the Review team staff if you need assistance. There is no required format for submissions. However, I encourage you to answer some or all of the questions at section 4.

If you make a written submission on the matters raised in this paper, please email your submission to: agentreview@justice.vic.gov.au by 21 September 2020.

If you make a submission, please indicate if you:

1. want your submission to be confidential;
2. are happy to have your submission quoted within a report to the Minister for Workplace Safety;
3. are happy to have your submission published on the Review website.

The report may, at the discretion of the Minister, be publicly released; it may also be subject to disclosure through freedom of information processes.

2. The agent model and complex claims

2.1 The agent model

WorkSafe and an injured worker's employer are liable for any compensation payable to the injured worker as the result of a workplace injury.³ Acceptance of a claim may result in payment to the injured worker of:

- weekly payments to compensate for lost earnings, calculated as a percentage of the worker's pre-injury average weekly earnings; and
- reasonable costs for medical and like expenses for treatment of the injury or illness.

WorkSafe generally delegates claims management and collection of premiums from employers to claims agents. WorkSafe has oversight of the agents' functions. A function or power performed or exercised by an agent is taken to have been performed or exercised by WorkSafe.⁴ Agents must operate in accordance with relevant laws, guidelines and instructions issued by WorkSafe.

There are currently five agents, appointed by WorkSafe using a common contract. WorkSafe's contracts with the current agents commenced on 1 July 2016 and end on 30 June 2021.

Employers are responsible for selecting the agent that will manage their workers' claims. Employers can move between agents every twelve months. Agents are not permitted to refuse to act as WorkSafe's agent for any specific employer.

The claims management functions of agents include:

- receiving claims;
- assessing claims and determining entitlements;
- managing claims that are accepted;
- participating in conciliation for disputed claim decisions; and
- defending disputed claim decisions in court.

Agents are paid a fee, as well as financial rewards and penalties linked to performance measures which are set in the contracts.

The outsourcing of claims management to agents is known as 'the agent model'. Some alternative models are described at 3.5.

³ *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* s 70 ('WIRC Act').

⁴ *WIRC Act* s 500(4).

2.2 Complex claims

In her 2016 and 2019 reports, the Victorian Ombudsman characterised claims that progress beyond 130 weeks as 'complex claims'. Under the WIRC Act, an injured worker's entitlement to weekly payments of compensation in respect of a workplace injury usually ends when a worker has received 130 weeks of weekly payments. However, payments will not cease where the worker is assessed as having no current work capacity and as being likely to continue indefinitely to have no work capacity.⁵

Complex claims make up only a small proportion of the total number of claims. As at June 2018, complex claims made up around a quarter of the 18,519 active weekly payments, or approximately seven per cent of the 63,085 active claims. However, these complex claims represented approximately 90 per cent of the scheme's liabilities (the amount calculated on actuarial assumptions as being the value of all benefits payable by the scheme).⁶

One of the methods by which WorkSafe oversees agent decision making and claims management is through 'health checks', which are high level reviews of a sample number of claims. In 2017-2018, WorkSafe conducted a 'health check' of claims likely to exceed 130 weeks and long-term claims where the worker was injured more than five years previously. It identified that claims that continue after 130 weeks tend to involve:

- longer decision timelines;
- a higher rate of rejection;
- greater lengths of time off work; and
- a higher rate of disputation over agent decisions.

Despite making up only a small proportion of workers' compensation claims, complex claims are the basis for a relatively high number of complaints to WorkSafe and the Victorian Ombudsman about agent conduct and decisions. This high number of complaints led to the two investigations by the Victorian Ombudsman into the management of complex claims in 2016 and 2019. These investigations are discussed at section 2.3.

As noted, most claims managed by agents are neither complex nor contentious, with around 90 per cent of injured workers returning to work in less than 52 weeks.⁷ WorkSafe data indicates that the likelihood of an injured worker returning to work dramatically decreases once they have received 52 weeks of payments.⁸

⁵ WIRC Act s 163.

⁶ Victorian Ombudsman (n 1) 14.

⁷ WorkSafe, Annual Report 2018-19 (2019) 142.

⁸ WorkSafe (n 7) 142.



Injured workers who are incapacitated for work:

- are only eligible to receive weekly payments for a maximum of 130 weeks (capped at \$2,460 per week, indexed annually), at a rate of up to 95 per cent of their pre-injury average weekly earnings (PIAWE) for the first 13 weeks, followed by up to 80 per cent of their PIAWE.
- cease receiving income compensation at 130 weeks unless:
 - they return to work for at least 15 hours a week, or
 - can prove they have no capacity for any work, and this is likely to continue indefinitely.

An injured worker who an agent considers does not meet these conditions is issued with a 'termination notice' by the agent at approximately 117 weeks. This provides 13 weeks' notice that weekly payments will be terminated.

An injured worker in such circumstances may apply to the agent for a continuation of their weekly payments. The agent has 28 days to respond to the worker's application. If the worker disagrees with the agent's decision, the worker can request conciliation (attendance at an alternative dispute resolution service). If the dispute relates to a medical question, the conciliation officer will refer the medical question to a medical panel (a panel of independent medical practitioners who issue binding medical opinions).

Since 30 April 2020, a worker can refer a decision relating to the termination of weekly payments or their current work capacity that is not resolved at conciliation to the Workers Compensation Independent Review Service for review. The Independent Review Service was introduced as a response to recommendation 3 of the Ombudsman's 2019 report.

If a worker is not satisfied with the outcome of this independent review, they can apply to Court for a further review.

Following termination of workers' compensation entitlements, it is common for workers to experience significant emotional distress and financial hardship. Many have no alternative but to transition to welfare payments. For most, these payments will be considerably less than what they received through WorkCover weekly payments.

2.3 Victorian Ombudsman's 2016 and 2019 reports

Overview

The Ombudsman's 2019 report followed on from her initial investigation in 2016 into WorkSafe and its agents. Both the 2016 and 2019 reports highlighted several deficiencies that indicated a number of complex claims were being mishandled by agents including evidence of:

- unreasonable decision-making by all five agents;
- agents maintaining unreasonable decisions at conciliation, forcing workers to take the matter to court;
- financial rewards encouraging agents to focus on rejecting or terminating entitlements; and
- limited accountability or oversight mechanisms of agent decisions by WorkSafe.

In the 2016 report, the Ombudsman made recommendations to the State government and WorkSafe aimed at addressing her concerns about the conduct of agents and their oversight by WorkSafe. All the recommendations were accepted by the government and WorkSafe.

Following the 2016 Ombudsman report, the Ombudsman undertook a follow up investigation in 2019 because she continued to receive many complaints about the conduct of agents. She investigated whether the implementation of the 2016 recommendations had improved:

- agent practices and decision making; and
- the effectiveness of WorkSafe's oversight.

The 2019 investigation concluded that, while the 2016 recommendations 'resulted in some changes to policies, procedures and practices, the evidence suggests that they were not enough to change agent behaviour and stop unreasonable decision making on complex claims'.⁹

In particular, the Ombudsman's 2019 report was critical of what she considered to be the continuation of unreasonable agent decision-making and poor agent culture driven by financial rewards and ineffective WorkSafe oversight.

Key findings of 2019 report

Following her 2019 investigation, the Ombudsman concluded that in too many complex claims, the system fails to ensure that adequate compensation is paid to injured workers 'in the most socially and economically appropriate manner, as expeditiously as possible'.¹⁰ She considered that '[n]othing short of wholesale changes to the system will address the issues identified by both the 2016 investigation and the current one'.¹¹

The Ombudsman considered that more significant changes to the way complex claims are managed were required to ensure better outcomes for vulnerable injured workers. Her key findings included:

⁹ Victorian Ombudsman (n 1) 219.

¹⁰ Victorian Ombudsman (n 1) 219.

¹¹ Victorian Ombudsman (n 1) 219.

- unreasonable decision making by agents on complex claims had continued, despite the findings and recommendations in her earlier 2016 report;¹²
- there was evidence of agents continuing to focus on terminating claims and maximising profit, and that financial rewards and penalties were influencing agents' offers at conciliation; and
- WorkSafe was not optimally using its oversight mechanisms to address unreasonable agent decision making on individual complex claims, or in identifying and responding to systemic issues.¹³

The Ombudsman also identified a number of specific complex claims in which she was of the opinion that agents had acted unreasonably or unjustly, or that the decision was wrong or 'unjust'.¹⁴ The 2019 report recommended an independent review of the agent model to determine how and by whom complex claims should be managed, considering both the need to ensure appropriate compensation is provided to injured workers and to protect the financial viability of the scheme.¹⁵

A full list of the Ombudsman's 2019 recommendations is at Appendix B.

¹² Victorian Ombudsman (n 1) 219.

¹³ Victorian Ombudsman (n 1) 221.

¹⁴ Victorian Ombudsman (n 1) 223.

¹⁵ Victorian Ombudsman (n 1) 224.

3. Key considerations for the review

3.1 Effectiveness of the agent model in delivering positive outcomes

This Review will examine whether the current agent model is effective in delivering positive health and recovery outcomes for injured workers, including prompt, effective and proactive treatment and management of injuries.

What are positive health and recovery outcomes?

Positive health and recovery outcomes for injured workers are often measured, both by workers' compensation schemes and by Safe Work Australia, by looking at sustainable return to work outcomes. A sustainable return to work outcome is where a worker returns to work and successfully remains at work for a specified period.¹⁶

WorkSafe Victoria also uses annual survey results of injured workers' experiences with the scheme to monitor health and recovery outcomes.

The Review will be informed by quantitative data relating to these issues. I will also consider research and more qualitative information to gain a broader understanding of what a positive health and recovery outcome is. This will include consultations with injured workers, healthcare providers and other representatives with direct experience of, and involvement in, the WorkCover scheme.

Agents' responsibilities to workers and employers

The quality of an agent's interactions with an injured worker have been identified by Safe Work Australia as a key influence on return to work outcomes.¹⁷

Both of the Ombudsman's reports identified potential tension between an agent's responsibilities to injured workers on the one hand, and to the employer which pays the insurance premium to the agent on the other. This tension was identified as being particularly likely with large employers that pay large premiums.

The Ombudsman reported instances where agents were alleged to have been unduly influenced by employers concerning:

- initial and continued rejection of claims;

¹⁶ Sustainable return to work outcomes are measured in different ways by different jurisdictions. Safe Work Australia's comparative monitoring reports use a qualitative survey measure. A worker is regarded as having a sustainable return to work outcome if they have at any time returned to work since sustaining the workplace injury and are still back at work at the time the survey is taken. WorkSafe uses data that indicates an injured worker has returned to work and that their return has been sustained for a minimum of three weeks.

¹⁷ Safe Work Australia, *National Return to Work Strategy 2020-2030: a national strategy to drive and leverage national action to improve return to work outcomes for workers with a work-related injury or illness* ('National Return to Work Strategy 2020-2030') (27 September 2019) 14.

- the selection of Independent Medical Examiners; and
- surveillance operatives and the termination of complex claims at 130 weeks.

Prompt and effective injury management can play a critical role in preventing initial claims from developing into complex claims. Early intervention and treatment of workplace injuries generally contributes to more successful outcomes for injured workers.¹⁸

Factors that influence poorer return to work outcomes include:

- delays in decision-making by agents;
- inflexible reliance on strict procedures; and
- poor communication.¹⁹

3.2 Targeted case management practices for complex claims

The Review will consider whether current case management procedures for complex claims reflect best practice and provide tailored treatment and support based on biopsychosocial factors, individual circumstances and medical advice. In particular, I will consider the adequacy of individualised support for injured workers. Biopsychosocial factors are an individual's biological, psychological and social factors and the interactions between them.

Some of the factors identified by WorkSafe as influencing claim complexity and long-term incapacity for work include:

- the significance of the injury;
- the presence of a primary or secondary mental injury;
- post-surgery complications;
- reliance on medication;
- the age of the worker; and
- the worker's transferrable skills.²⁰

Agents are required to consider a worker's individual circumstances before issuing a return to work non-compliance notice. They must contact a worker to discuss their obligations and ask why they are non-compliant before issuing a notice.²¹ The Ombudsman's review of complex claims found that, in several cases, agents did not

¹⁸ Monash Centre for Occupational & Emotional Health/Institute for Safety, Compensation and Recovery Research, *Victorian Injured Workers Outcome Study- Study 1- A qualitative enquiry into outcomes for injured workers in Victoria who have longer term claims* (2018) 7.

¹⁹ Safe Work Australia (n 17) 36.

²⁰ Victorian Ombudsman (n 1) 187.

²¹ WorkSafe, *Claims Manual*, part 5.1.1.



genuinely consider workers' individual circumstances or the reasonableness of their non-compliance.²²

Individual circumstances may include a worker's:

- levels of social and community support;
- relationship with their employer;
- education and training; and
- linguistic and cultural diversity.

Following its 2017 – 2018 'health check' of long-term claims, WorkSafe concluded that current claims management methods were no longer able to improve outcomes for long term injured workers. It concluded that a new approach was needed to meet injured workers' individual needs.²³

As an initial response, WorkSafe established a pilot program to develop tailored action plans to address the needs of individual workers. The action plans were developed by a medical advisor, lawyer and key staff from WorkSafe and its agents. WorkSafe advised the Ombudsman that the lessons of the pilot had been used to develop an ongoing twice-yearly health check for long term claims.²⁴

3.3 Influence of financial incentives on agent decision making

Agents are paid by WorkSafe for acting on its behalf. This payment includes an annual fee for the agent's standard operating costs, in addition to financial rewards and penalties. These rewards and penalties are determined by an agent's performance measured against key criteria set by WorkSafe.

Agents are commercial entities. They have financial considerations among their obligations. WorkSafe also uses financial incentives for agents as one of its measures to maintain a financially viable scheme.

Although the specific criteria are adjusted each year, the financial incentive criteria generally relate to:

- an agent's performance in meeting return to work targets;
- the financial stability of the scheme;
- the quality of decision making; and
- services provided to injured workers.

²² Victorian Ombudsman (n 1) 84.

²³ Victorian Ombudsman (n 1) 188.

²⁴ Victorian Ombudsman (n 1) 188.



In her 2016 report, the Ombudsman found that the management of complex claims was particularly affected by financial incentives for agents. Her report highlighted that agents appeared to be focused on terminating claims at 130 weeks to receive the associated financial rewards.²⁵ In response to the 2016 findings, WorkSafe made changes to the financial incentives for agents for complex claims. The changes aimed to increase the focus on service delivery to injured workers. For example, changes were made to time frames for making decisions and providing compensation entitlements, quality decision making, recovery and return to work support.²⁶

The 2019 report found that overt references to ‘termination strategies’ and financial rewards and penalties as a basis for decision making on claims had decreased since 2016. However, there was evidence that financial incentives were still a major focus of claims management for complex claims.²⁷ The report cited comments from agent emails, former agent staff and conciliation officers suggesting financial incentives were often the basis for agent decision making in complex claims.²⁸ This was particularly the case at conciliation conferences, which are an alternative dispute resolution service intended to facilitate the resolution of workers’ compensation disputes.

Financial incentives to terminate claims may negatively affect resolution rates at conciliation. For example, if an agent focuses on a financial target based on the number of claims terminated by 130 weeks, they may be less likely to agree reasonable settlement terms with a particular injured worker at conciliation.

Delays in resolving disputes can lead to more complicated dispute resolution (with associated financial and emotional costs for workers) and delays or gaps in injured workers receiving compensation.

3.4 WorkSafe oversight of agents

WorkSafe is directly liable to pay compensation to an injured worker.²⁹ Although the management of claims is delegated to agents, WorkSafe maintains responsibility for overseeing agents’ claims management and ensuring injured workers are appropriately compensated. Agents must manage claims in accordance with the WIRC Act, written directions provided by WorkSafe and the terms and conditions of their contract.³⁰ If an agent fails to comply with these requirements, WorkSafe may terminate its appointment.

²⁵ Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight* (12 September 2016) 158.

²⁶ Victorian Ombudsman (n 1) 228.

²⁷ Victorian Ombudsman (n 1) 145.

²⁸ Victorian Ombudsman (n 1) 145- 150.

²⁹ *WIRC Act* (n 3) s 70.

³⁰ *WIRC Act* (n 3) s 500(1)-(2).

WorkSafe's processes for overseeing agents' management of claims include:

- Auditing the quality of agent decisions — WorkSafe scores a decision as a pass or fail based on whether the decision was made in accordance with the WIRC Act and was supported by 'reasons' based on 'reasonable and appropriate evidence at the time of the decision';³¹
- Responding to complaints;
- Conducting annual surveys of injured workers' experiences; and
- Carrying out targeted 'health checks' of specific claims management issues.³²

The Ombudsman's 2019 report raised potential limitations regarding WorkSafe's oversight of agent decision making.³³ The report found that WorkSafe:

- allowed 'questionable' decisions by agents to stand despite identifying potential issues with the decision making.
- reassessed a significant number of agent decisions that it had originally 'failed' as passes (nearly three quarters) following agents' requests to review a decision. In some cases, it was unclear why assessments were changed as the issues initially identified through the audit had not been resolved or addressed.
- failed to reinstate worker entitlements when an agent's decision failed an audit. In some cases, it was unclear why WorkSafe did not conclude the worker had been 'wrongfully disentitled' and require the agent to overturn its decision.
- failed to follow up on actions identified in audits in some cases.
- failed to address issues raised in complaints adequately.

WorkSafe's response to the Ombudsman's draft report (2019) findings noted that it had recently implemented a range of new mechanisms for overseeing agents and increasing the frequency of reviewing agent decisions. However, WorkSafe also acknowledged that there was opportunity to strengthen its oversight and regulatory activities, complaint management functions and consequences for non-compliance.³⁴

3.5 Alternatives to the agent model

The Review will consider alternative compensation schemes as part of the assessment of the suitability and effectiveness of the current agent model in managing complex claims.

³¹ Victorian Ombudsman (n 1) 156.

³² Victorian Ombudsman (n 1) 185.

³³ Victorian Ombudsman (n 1) 156-188.

³⁴ Victorian Ombudsman (n 1) Appendix 1, 229.



Across Australian and New Zealand compensation jurisdictions, there are three main models for managing compensation schemes:

1. Management by a statutory insurer (such as the Transport Accident Commission scheme in Victoria, Queensland's workers' compensation scheme and New Zealand's accident compensation scheme). In effect, schemes managed by a statutory insurer manage claims 'in house'.
2. Privately underwritten schemes managed by private insurers (such as the workers' compensation schemes of Tasmania and Western Australia).
3. Agency models (such as the Victorian, New South Wales and South Australia workers' compensation schemes).

The Review will explore the impact of these different models on complex claims management and the delivery of positive and prompt health and recovery outcomes for claimants.

In addition to the agent model, the Victorian scheme (as well as other Australian schemes) allows several large employers to self-manage and pay for employee claims for workplace injuries. These employers are known as self-insurers. They must meet a range of compliance requirements and be authorised by WorkSafe. Self-insurers are required to comply with all relevant laws relating to payment and management of workers' claims. The Review is interested in how these self-insurers manage their complex claims.

The National Disability Insurance Scheme (NDIS) is another model I will consider. It differs from workers' compensation schemes as it only provides support to individuals with permanent and significant disability. It requires an NDIS plan to be approved by a statutory body (the National Disability Insurance Agency).³⁵ An NDIS plan sets out an individual's entitlements to disability services. Local Area Co-ordination partners are responsible for the initial drafting, implementation and reviewing of the plan.

The Review will consider these alternative compensation and insurance frameworks to inform consideration of the potential benefits and limits of any proposed changes to the current agent model. I welcome comment on these schemes.

³⁵ See generally *National Disability Insurance Scheme Act 2013* (Cth), Ch 3.

4. Questions

The following questions are intended to guide your response to the discussion paper. You may answer as many or as few questions as you like.

Background

1. For individuals, please explain your experience of the workers' compensation scheme if any.
2. For organisations, please describe your organisation.

Identifying and assessing complex claims

3. What are the features of a claim for worker's compensation that make it complex, or at risk of being complex?
4. How, and at what stage, should claims for worker's compensation be assessed as being complex, or at risk of becoming complex?

Case management of complex claims

5. Are current case management practices able to support and treat the individual needs of injured workers with complex claims?
6. If your answer to question 5 is yes, describe how current case management practices respond to the individual needs of injured workers with complex claims.
7. If your answer to question 5 is no, describe what needs to change in the case management practices of complex claims so that injured workers are better supported and treated.

Financial incentives and agent decision making

8. What role do the current financial incentives for agents have in the agent's management of complex claims?
9. Do the current financial incentives for agents support prompt, effective and proactive outcomes for injured workers with complex claims?
10. If your answer to question 9 is yes, describe
 - a. how the current financial incentives for agents maximise outcomes for injured workers with complex claims.
 - b. any different or additional measurements which could be linked to financial incentives to promote quality decision making by agents.

11. If your answer to question 9 is no, describe
 - a. the ways in which the current financial incentives for agents could be changed to maximise outcomes for injured workers with complex claims.
 - b. any different or additional measurements which could be linked to financial incentives to promote quality decision making by agents
12. Describe any non-financial mechanisms by which agents could be encouraged to promote quality decision making.

Oversight of agents by WorkSafe

13. Are WorkSafe's processes for overseeing agents' management of claims achieving prompt, effective and proactive outcomes for injured workers?
14. Do the new mechanisms implemented by WorkSafe in response to the Ombudsman's 2019 report address any limitations in WorkSafe's oversight of agent decision making?
15. If your answer to question 14 is yes, describe how.
16. If your answer to question 14 is no, describe why not.
17. How could any limitations in WorkSafe's oversight of agent decision making be overcome?

Evaluation measures

18. To what extent do current measurements of outcomes for injured workers, including return to work rates and worker surveys, accurately measure whether the agent model achieves prompt, effective and proactive outcomes for injured workers?
19. Describe any additional or alternative methods of measuring outcomes for injured workers that should be considered?

The current agent model and alternative models

20. Does the current agent model achieve prompt, effective and proactive management for injured workers with complex claims?
21. If your answer to question 20 is yes, to the extent you haven't addressed your response in answers to earlier questions, describe how the current agent model achieves prompt, effective and/or proactive management for injured workers with complex claims.
22. If your answer to question 20 is no, to the extent you haven't addressed your response in answers to earlier questions, describe
 - a. the limitations of the current agent model,
 - b. how the current agent model could be improved to achieve better health and recovery outcomes for injured workers, and/or

- c. any alternative models to the current agent model that would be more effective in delivering positive health and recovery outcomes to injured workers.

In your answer to question 22 b. and c., consider the effect of any change to the current agent model on the financial viability of the scheme.

23. Are there practices or procedures used by other compensation schemes, in Australia or overseas, that maximise outcomes for injured workers that the Review should examine?

Victorian Ombudsman 2016 and 2019 reports

24. Have you observed any changes to (i) agent decision making and (ii) the oversight of agents by WorkSafe since the 2016 Ombudsman report? Please describe.
25. What are the root causes of the problems identified by the Ombudsman in her 2016 report?
26. Do you think the implementation of the recommendations 3–9 in the 2019 Ombudsman report will address those root causes? If so, how will that occur?
27. If you do not think the implementation of recommendations 3–9 in the 2019 Ombudsman report will address those causes, explain why not.

Further considerations

28. Are there any other matters the Review should consider in meeting the Terms of Reference?

Review of the Agent Model into the Administration and Management of Complex Claims

Terms of Reference

Background

1. The Victorian Workcover Authority (WorkSafe) is responsible for the administration of Victoria's workers' compensation scheme, known as WorkCover, to ensure it provides support for workers with a work-related injury, is sustainable, fair and affordable to businesses.
2. WorkSafe administers the scheme by delegating most of its claims management and premium collection functions to appointed insurance agents. Agents are required to determine liability and entitlement for all claims in accordance with relevant legislation (principally the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act)).
3. Collectively, the agents manage around 90,000 claims every year and are remunerated through an annual service fee and financial incentives for achieving performance measures. There are currently five scheme agents whose contracts with WorkSafe expire in June 2021.
4. According to WorkSafe's 2018 Annual Report, most claims managed by agents are neither complex nor contentious, with 59 per cent of injured workers returning to work within 13 weeks, 75 per cent before 26 weeks and 90 per cent prior to 52 weeks.
5. However, once a claim progressed beyond 130 weeks they are defined as complex claims. Complex claims have longer decision timelines, a higher rate of rejection, involve greater lengths of time off work and have a higher rate of disputation over agent decisions.
6. As at 30 June 2018, these claims represented about a quarter of the 18,519 active weekly payments in the scheme, or about seven per cent of the total 63,085 active claims in the scheme (including those involving medical treatment only).

Complex Claims

7. The Victorian Ombudsman undertook an investigation in 2016 into the management of complex workers' compensation claims and WorkSafe oversight.

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8. The investigation highlighted several deficiencies that indicated a growing number of complex claims were being mishandled by agents, including evidence of:
 - a. unreasonable decision-making across all five agents
 - b. agents maintaining unreasonable decisions at conciliation, forcing workers to take the matter to court or terminate their claim without compensation
 - c. financial rewards encouraging agents to focus on rejecting or terminating WorkCover entitlements, and
 - d. limited accountability or oversight mechanisms of agent decisions.
 9. In 2019, the Victorian Ombudsman conducted a follow up investigation and found that despite targeted policy and system reforms, little had improved in the handling of complex workers' compensation claims since 2016, with continued unreasonable agent decision making and poor agent culture driven by financial rewards and ineffective WorkSafe oversight.
 10. In response, the Ombudsman made 15 recommendations, two to government and 13 to WorkSafe. These Terms of Reference implement Recommendation 1 which stated:

Commission an independent review of the agent model to determine how and by whom complex claims should be managed, taking into account:

 - a. the need to ensure appropriate compensation is provided to injured workers, as well as the financial viability of the scheme
 - b. the experience of other accident compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international workers' compensation jurisdictions.

Scope of Review

11. The Review will assess the suitability, adequacy and effectiveness of the outsourced agent model in the administration and management of complex claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (the Act).

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12. The Review will determine how and by whom complex claims should be managed to maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme.
 13. For the purpose of the Review, complex claims are defined as those where the injured worker has received 130 weeks or more of weekly payments (including claims that were suspended or terminated during this period).
 14. However, irrespective of the complexity of a claim, the Review should consider the personal circumstances of claimants which may ultimately contribute to them having 'complex claims', as defined at 130 weeks.
 15. In forming its findings and developing recommendations the Review should inquire into:
 - a. Whether the agent model is effective in delivering and achieving positive health and recovery outcomes, including prompt, effective and proactive treatment and management of injuries.
 - b. Whether case management processes and practices for complex claims reflect best practice and provide tailored treatment and support based on biopsychosocial factors, individual circumstances and medical advice.
 - c. Whether policy, oversight and governance arrangements, including financial and performance incentives support and promote best practice, timely, sustainable and quality decision making by agents.
 - d. Any other matters that the Reviewer deems necessary including any potential system wide implications.
 16. In undertaking the Review, the Reviewer will consider:
 - a. the experience of other compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international compensation jurisdictions or insurance schemes including the National Disability Insurance Scheme;
 - b. the Victorian Ombudsman's Report in 2016 and 2019 into the management of complex workers' compensation claims and WorkSafe oversight;

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- c. the impact of emerging risks which may impact claim numbers and to the viability of the workers' compensation scheme;
 - d. any relevant work that is being or has already been undertaken in this area, including recent or ongoing legislative and regulatory reforms relating to the Act and workers' compensation system; and
 - e. the implications of retaining, limiting or removing agents from performing claim management functions on behalf of WorkSafe.
17. Where the Reviewer finds the policy, legislative or regulatory framework could be improved, the Reviewer must provide recommendations to give effect to such improvements.
18. In forming its recommendations, the Review must have regard to the implications of any changes for the financial viability of the workers' compensation scheme and the cost of WorkCover insurance for employers.

Recommendations from Victorian Ombudsman's WorkSafe 2 report 2019

To the Victorian Government

Recommendation 1

Commission an independent review of the agent model to determine how and by whom complex claims should be managed, taking into account:

- a. The need to ensure appropriate compensation is provided to injured workers, as well as the financial viability of the scheme
- b. The experience of other accident compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international workers compensation jurisdictions.

Recommendation 2

Introduce a new dispute resolution process which:

- a. Allows for binding determinations on the merits of claims decisions, including factual disputes; is inexpensive; and provides timely outcomes
- b. Complements the existing dispute resolution process of conciliation and legal review at court.

To WorkSafe Victoria

Recommendation 3

Establish a dedicated business unit to independently review disputed decisions when requested by workers following unsuccessful conciliation.

Recommendation 4

Amend its quality decision making audit procedure to ensure that:

- a. Only sustainable decisions pass
- b. Unsustainable decisions identified through the audit process are overturned.

Recommendation 5

Establish a centralised complaints process which triages and provides a single point of contact for all complaints about the claims process, including agent decisions and IMEs

Recommendation 6

Update the Claims Manual, and provide training to agent staff, to:

- a. require that agents make sustainable decisions
- b. require that agents provide reasons in an adverse decision notice if they have disregarded or discounted any relevant evidence or information in making the decision
- c. clarify and expand the requirements about agents' use of surveillance, including what constitutes 'adequate evidence', record keeping standards and the use of surveillance in mental injury claims
- d. clarify the circumstances in which agents should refer a worker to a psychiatrist IME for assessment of a potential secondary mental injury
- e. provide guidance on the appropriate IME specialty to assess workers with chronic pain syndrome or a pain disorder
- f. provide guidance on the rejection of mental injury claims under section 40(1) of the WIRC Act (reasonable management ground), including the evidence required to support a decision on this ground
- g. provide clarification and greater guidance regarding the circumstances in which it is appropriate to issue a return to work non-compliance notice, including assessment of whether a worker has made 'reasonable efforts' to comply with their obligations
- h. provide guidance on the evidence required to show a 'material change' in a worker's condition since a previous Medical Panel examined them and provided an opinion.

Recommendation 7

Increase WorkSafe's oversight of the following claims management activities by agents, through targeted 'health checks' or audits:

- a. agents' use of surveillance
- b. mental injury claims rejected under section 40(1) of the WIRC Act (reasonable management ground)
- c. return to work non-compliance notices
- d. terminations of 'top up' weekly payments provided under section 165 of the WIRC Act (or section 93CD of the Accident Compensation Act).

Recommendation 8

Amend the Injured Worker Survey measure so that it better targets complex claims, which may include:

- increasing the focus on complex claims in the current survey; or
- introducing a separate survey of workers with complex claims.

Recommendation 9

Introduce a contractual requirement regarding the timeframe in which agents must respond to

- a. requests for reinstatement of weekly payments
- b. requests for medical and like treatment.

Recommendation 10

Establish a mechanism enabling the regular review of Medical Panel outcomes to identify potential trends in

- IME opinions
- agents' use of IMEs
- agent decision making.

Recommendation 11

Amend its IME Quality Assurance processes to ensure that reviewers are provided all of the documentation the IME considered to inform their examination of the worker and prepare their report.

Recommendation 12

Ensure IMEs consider the definition of 'suitable employment' in the WIRC Act when forming opinions about whether a worker has a current work capacity, by:

- a. amending the relevant template question(s) so that IMEs are required to detail how they considered each factor in the definition of 'suitable employment' when providing their opinion, similar to the way in which Medical Panels address this
- b. providing training to IMEs on what constitutes 'suitable employment'.

Recommendation 13

Provide different time allocations for independent medical examinations of injured workers with 'complex claims' and remunerate IMEs for these accordingly.

Recommendation 14

Provide guidance and/or training to IMEs regarding:

- a. what constitutes 'material change' in a worker's condition since a previous Medical Panel examined them and provided an opinion
- b. how surveillance material should be considered when forming an opinion about a worker's work capacity.

Recommendation 15

Undertake a further review of the issues identified by the investigation regarding IME Y and engage with them direct to ensure any necessary changes to their practices occur.

List of identified interested organisations and individuals

<ul style="list-style-type: none"> • Unions <ul style="list-style-type: none"> • Australian Education Union • Australian Manufacturing Workers Union • Australian Meat Industry Employees Union • Australian Nursing & Midwifery Federation • Australian Services Union • Australian Services Union Victorian Private Sector • Australian Workers Union • Communications, Electrical Plumbing Union • Community & Public Sector Union • Construction, Forestry, Maritime, Mining and Energy Union • Electrical Trades Union • Financial Services Union • Health and Community Services Union • Independent Education Union • Maritime Union of Australia • Media, Entertainment & Arts Alliance • National Tertiary Education Union • Police Association of Victoria • Professionals Australia • Rail, Tram & Bus Union 	<ul style="list-style-type: none"> • WorkSafe agents <ul style="list-style-type: none"> • Allianz • CGU • Employers Mutual Ltd • Gallagher Basset • Xchanging • Peak employer representative bodies <ul style="list-style-type: none"> • AI Group • Chamber of Commerce • Housing Industry Association • Master Builders Association • Self Insurers Association of Victoria • Victorian Farmers Federation • Government agencies <ul style="list-style-type: none"> • Accident Conciliation and Compensation Service • Medical Panels • Transport Accident Commission • Victorian Ombudsman • WorkSafe Victoria • Medical, allied health and legal service providers <ul style="list-style-type: none"> • Australian Lawyers Alliance • Australian Medical Association • Australian Rehabilitation Providers Association • Law Institute of Victoria
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- Shop and Distributive Allied Employees Association
- Transport Workers Union
- United Firefighters Union
- United Workers Union
- Victorian Ambulance Union
- Victorian Trades Hall Council

- Royal Australian College of General Practitioners
- Victorian Allied Health Professionals Association
- Compensation Law Bar Association
- Common Law Bar Association
- **Injured workers with complex claim experience**