Australian Industry Group

Modernising WA's Workers Compensation Laws

Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Submission to WorkCover WA

NOVEMBER 2021

MODERNISING WA'S WORKERS COMPENSATION LAWS

WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2021 (CONSULTATION DRAFT)

SUBMISSION TO WORKCOVER WA

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of businesses employing more than one million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Our vision is for ***thriving industry and a prosperous community*****.**

We have ongoing contact and engagement with employers across Australia on the broad range of issues related to the operation of their businesses, informing them of regulatory changes, discussing proposed regulatory change, discussing industry experiences and practices and providing advice, consulting and training services.

We also interact with and provide regulators and scheme managers across all Australian jurisdictions with employer views and experience on WHS/OHS and workers compensation.

Our membership is diverse, operating across a broad spectrum of industries. We have a significant number of large organisations within our membership. However, around three quarters of our members employ fewer than 50 employees and half employ fewer than 20 employees.

Ai GROUP SUBMISSION

Ai Group welcomes the opportunity to make a submission in response to the release of the Workers Compensation and Injury Management Bill 2021 (Consultation Draft). The process of informing our Members of the proposed changes and analysing the impact was greatly assisted by the *Comparison with Current Act Key Provisions* and *Fact Sheets* developed by WorkCover WA and the cross referencing included in the Consultation Draft.

In this submission we have addressed issues in the same order as they were presented in the Comparison document referred to above.

Reasonable administrative action exclusion (clause 7)

Current Act	Consultation Draft
Section 5(1) creates an exclusion to the definition of injury by stating that it "does not include a disease caused by stress if the stress wholly or predominantly arises from a matter mentioned in (4) unless the matter is mentioned in paragraph (a) or (b) of that subsection and is unreasonable and harsh on the part of the employer Section 5(4) then states: For purposes of the definition of injury, the matters are as follows — (a) the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment; and (b) the worker's not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment; and (c) the worker's expectation of — (i) a matter; or (ii) a decision by the employer in relation to a matter, referred to in paragraph (a) or (b).	Clause 7 states: (1) In this section — administrative action includes any of the following actions — (a) an appraisal of the worker's performance; (b) counselling action (whether formal or informal); (c) suspension action; (d) disciplinary action (whether formal or informal); (e) anything done in connection with an action described in paragraph (a), (b), (c) or (d); (f) anything done in connection with the worker's failure to obtain a promotion, reclassification, transfer or other benefit, or to retain any benefit, in connection with the worker's employment. (2) A psychological or psychiatric disorder, including any physiological effect of the disorder on the nervous system, that a worker experiences is not an injury from employment if it results wholly or predominantly from — (a) administrative action, not being administrative action that is unreasonable and harsh on the part of the employer; or (b) the worker's expectation of administrative action or of a decision by the employer in relation to administrative action.

Ai Group welcomes the addition of specific criteria such as appraisal of the workers' performance, counselling, disciplinary action (whether formal or informal) and suspension. However, we are concerned the that the new definition does not specifically include reference to dismissal, retrenchment or demotion which appear in the current exclusionary provisions.

We note the change in wording from a list that only covered the activities listed by using the words "the matters are as follows", compared to "administrative action includes". However, our concern is that the list will be read literally and key actions that should create an exclusion from entitlement, subject to not being unreasonable and harsh, may not be excluded.

It is Ai Group's view that the wording in the Bill should be expanded to specifically incorporate all of the current activities, in addition to the new ones. Further, the list should be preceded by "including, but not limited to".

The Victorian Workplace Injury Rehabilitation and Compensation Act provides an example of a broader definition, which in that situation defines management action, as follow:

> ***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;*
> *(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;*

If liability decision not given or given late (clause 29, 30)

Ai Group is concerned that the deemed liability accepted day for a claim where a deferred decision notice was given will be included in the Regulations, rather than be specified in the Act. The Information Sheet indicates that in these circumstances the "prescribed day is likely to be 90 days from when the claim was given to the insurer or self-insurer".

90 days would seem like a reasonable period of time, and we encourage the government to not make the timeframe too short.

Provisional payments (clause 37 to 45)

Provisional payments will be made to a worker if a liability decision notice is not given to the worker by the prescribed day – the provisional payments day. Again, we are concerned that the provisional payments day is not included in the Consultation Draft and will be implemented via Regulations. The Information Sheet states that "the prescribed day is likely to be 28 days after receiving the claim". We would support this period of time being included in the Regulations.

Medical and health expenses (clause 70 to 93)

There is a significant increase to the general limit for medical and health expenses; increasing from $71,754 to $143,507 in the 2021/22 financial year. No information is provided about the expected impact on claim costs and resultant premium increases. If this increase proceeds, an assessment of financial impact should be made after the first year to ensure that any significant increase in costs is assessed, with the ability to make adjustments to this provision if necessary.

Income compensation (clause 54 to 60)

Ai Group welcomes the amendments that simplify the calculation of weekly compensation by removing the variation in calculation between Award and non-Award workers.

It is acknowledged that the extension of the first entitlement period, before a step-down occurs, from 13 weeks to 26 weeks, was an election promise. However, we are concerned about the potential impact on return to work rates when a worker will be entitled to 100% of their pre-injury earnings for twice as long as is currently the case.

The potential impact of this change on return to work rates should be monitored once the legislation has been in place for 13 weeks to identify any unintended consequences on return to work.

Return to work case conference (clause 164)

Ai Group supports this provision which allows the employer or the employer's insurer to require attendance at a return to work case conference, supported by clause 162(4) which requires the worker to comply. It is essential that the quality of such case conferences deliver the desired outcomes of better engagement between all those involved in the claim, particularly enhancing the relationship between employer and injured worker to better facilitate positive and successful return work.

Treating medical practitioners and certificates of capacity (clause 169 to 171)

Ai Group welcomes the inclusion of function of the treating medical practitioner (TMP) into the Bill. However, in order to have any impact on the role the TMP has in assisting the return to work process, this change will need to be supported by clear guidance and education for TMPs. Without this, the change will be nothing more than words in an Act; and Act that TMPs are unlikely to read.

It is logical that other health professionals who are taking on the primary treatment role would be permitted to issue certificates of capacity and be actively involved in the return to work process.

Worker choice of medical practitioner (clause 170)

It is noted that it has always been an underlying principle that a worker has the right to choose their medical practitioner.

Including this provision in the Bill removes any doubt or confusion that may apply to this scenario.

However, guidance will be needed to ensure that the provision is not interpreted to stop an employer or insurer from requiring attendance with another medical practitioner for medico-legal reasons or to assist with return to work.

Prohibition on employer attendance at medical examination (clause 171)

The new provisions are very short, stating:

> *A worker's employer, the employer's insurer or an agent of the insurer must not be present at a medical examination of the worker by the worker's treating medical practitioner or another health professional permitted under the regulations to issue a certificate of capacity for the worker*

We have not been able to identify anything in the Act that defines what is meant by "present at a medical examination". Does it mean:

- the employer is not permitted to be in the examination room during the examination? OR
- the employer cannot take the worker to the medical practice and wait in the waiting area? OR
- the employer is not permitted to have a meeting at the doctor's premises following a medical examination in order to discuss return to work options? OR
- some other specific circumstances?

In some cases, particularly if the examination does not require the worker to disrobe, the injured worker may ask the employer's representative to stay with them until a family member arrives. This may especially be the case in smaller businesses when the employer and workers are also friends. Is this also to be prohibited?

To ensure that there are no unintended consequences associated with this provision, it will be essential that clear guidance is provided on how these provisions are intended to apply.

Labour hire and host organisations (clause 14 and 167)

Ai Group is supportive of this new provision which requires the host employer to cooperate with the labour hire company "to the extent that it is reasonable to do so" in relation to return to work. However, any enforcement activity associated with this provision will need to take into account the individual circumstances of the injury and the extent of the intended engagement by the host. For example, there would be differing expectations between a long-term placement and a person who was only every going to be working for the host for one week. Providing labour hire companies with short information documents they can supply to hosts would be a good way of increasing awareness of this new obligation.

Pre employment screening

The Bill prohibits the disclosure of information about a worker's claim for compensation (or claim history) to another person for the purpose of pre-employment screening. It also provides that a worker cannot be required to disclose information about a compensation claim for the purpose of selection for employment. Whilst we do not have a specific objection to the prohibition, small employers are unlikely to be fully aware of any such provisions and may unintentionally breach this provision during reference checking. A penalty of $10,000 is significant for an unintentional breach. It is hoped that any enforcement action would take into account whether the person could have been expected to know of the prohibition.

Further, in relation to the issue of a worker disclosing information about a claim, it is important that this provision is not able to be used for a worker to provide false information to a prospective employer about an illness or injury that may impact on their ability to do the inherent requirements of the job.

It would be helpful if the Bill, or notes in the Bill, could assist with clarifying this. Alternatively, guidance should be provided to illustrate how this provision is intended to apply and that it does not exclude an employer from seeking information from a potential employer about their fitness to do the work required.