CFMEU
WESTERN AUSTRALIA

SUBMISSIONS ON THE WORKERS' COMPENSATION & INJURY MANAGEMENT BILL 2021 (CONSULTATION DRAFT)

NOVEMBER 2021

1. INTRODUCTION

A. Every 10 years or so, governments of various persuasions promise to fix workers' compensation. It is regularly said that that the system needs to be overhauled because it is too complex, not fair or not properly compensating workers. The intention leading to the current system was to have a specialist tribuneral dedicated to improving injured workers' lives. To date, every tranche of reform has failed.

B. Attempts at reforms which would resolve disputes in a manner that was 'fair, just, economical, informal and expedient' have historically led to poor outcomes for the workers relying on the workers' compensation system. These reforms have created a system that, from a general perspective:

1. Values conciliators who are measured simply by the number of disputes they resolve. Those conciliators use tactics such as the length of time it will take for the worker to settle their matter as a stick to incentivise the injured worker to settle more expeditiously, with workers often taking less than what they deserve due to the extended period without meaningful income.

2. (In or about 2015) established an unregulated, unlegislated alternative dispute resolution system (called 'pre-arbitration') to massage the real figures associated with resolutions and drive settlement of claims. There is no legal basis or function which gives rise to this system of dispute resolution and as a result, lacks any level of transparency or scrutiny. Further, this 'pre-arbitration' cannot be accessed until the worker has waited at least 6 months (but more often 12 months) post injury. There can be no clearer acknowledgement that the system needs reform.

3. Delivers up to 9-12 month (from the date of injury) wait to get to arbitration where a worker needs to, in order to substantiate their claims, file lists of authorities and outlines of submissions, similar to the standard required in Federal Court. This is neither informal nor quick and certainly not economical. To make a unwaged worker wait 12 months for a compensation decision with no resolution, with the only way out being to settle, could never be said to be fair.

4. Allows decisions to be handed down by individuals with no obvious experience or specialist background in compensation.

C. With respect to the current proposed reform, it is problematic that the *Workers' Compensation & Injury Management Bill 2021 (Consultation Draft)* **(Bill)** is based on the recommendations of Workcover's 2014 report, commissioned by the Barnett Liberal Government, entitled *Review of the Workers' Compensation and Injury Management Act 1981: Final Report* **(Final Report)**. The Final Report was commissioned following the implementation of amendments of the first tranche of reform to the *Workers' Compensation and Injury Management Act 1981* **(Current Act)** in or about 2011. We note that:

1. Conservative Liberal governments have a poor track record in delivering real reform to the advantage of workers; and

2. The review itself was commissioned some 12 years ago. There has been considerable and extensive development in workers' compensation law in Western Australia over that period. This calls into question the relevance and probity of the recommendations on which the Bill is based.

D. Notwithstanding the above, it is integral that this round of reform is meaningful, with workers' health, safety and dignity central to our thinking. If long lasting reform can somehow be achieved, it will be a significant improvement in the conditions of workers and their families.

2. DEFINITION OF A WORKER (cl. 12,13 of the Bill)

A. The CFMEU does not support the transition from the definition of 'worker' in the Current Act to a definition based on the meaning of an 'employee' for Pay-As-you-Go **(PAYG)** withholding tax pursuant to

Commonwealth taxation law as proposed in the Bill.

1. The proposed definition in the Bill is narrower in scope and will likely exclude workers from eligibility to make a workers' compensation claim.

2. The proposed definition in the Bill is inconsistent with the meaning of a worker/employee at Common Law which considers:

   i) the level of control in a relationship as the primary indicator for establishing the employer/employee relationship; and

   ii) the dichotomy between employer and independent contractor,

   to determine who is an employee in a given situation. This is particularly important in the construction industry, where the nature of employment has changed and evolved with a move away from more traditional forms of employment to more transient and 'flexible' work practices such as labour hire or independent contracting. In this regard, the proposed definition may exclude large swathes of the construction industry from being eligable to apply for support within the scheme.

3. The only jurisdiction in Australia which utilises the proposed definition in the Bill is Queensland, with all other jurisdictions favouring a broader approach. In fact, Queensland itself recently (2018) underwent a review into its workers' compensation scheme which recommended a move away from the definition of 'worker' being linked to the PAYG definition due to its limitations and the likelihood of exclusory practices.

B. The CFMEU supports an expansion of the definition in the Current Act which reflects how the labour market has changed. Such a definition must cater for the growth of employers' drive for flexibility, and the emergence of new forms of work.

RECOMMENDATION 1

Reject the definition of 'worker' based on a meaning of an 'employee' for PAYG withholding tax in the Bill.

3. THE REASONABLE ADMINISTRATIVE ACTION EXCLUSION (cl.7 of the Bill)

A. The CFMEU does not support the expansion of the exclusion for psychological and/or psychiatric disorders, which arise out of 'administrative action' as proposed in the Bill:

1. The Current Act excludes psychological injuries which arise during the course of or as a result of (as an example) employment related matters such as instances of dismissal, retrenchment, demotion, discipline, transfer or redeployment and the worker not being promoted or reclassified.

2. The proposed definition of 'administrative action' in the Bill is broad, to the extent that it is likely to capture many, if not all communication between worker and employee and represents additional

avenues/pathways for employers and insurance providers to exclude claims which would ordinarily be successful under the Current Act.

3. To determine the impact of the exclusion, context can be derived from a similar (if not identical) provision found in the *Safety, Rehabilitation and Compensation Act 1998* **(SRC Act)** and the relevant legal decisions regarding the interpretation of the exclusion. Two pertinent decisions which ventilate the problems with the exclusion and the negative impact on workers are as follows:

   i) In *Comcare v Martin 258 CLR 467* (2016), the High Court found that the 'administrative action' need not be the sole cause for the psychological harm, but where a genuine psychological injury arises (such as bullying and harassment) the worker will be excluded from making a workers' compensation claim in circumstances where an 'administrative action' also occurs.

   ii) In CBA v Reeve 199 FCER 463 (2012) the Full Court considered why the 'administrative action' exclusion was introduced into the SRC Act, stating in effect:

   "the purpose….was to broaden the exclusion of matters from the previous definition of "injury" so that an employer would not be unduly inhibited in taking reasonable administrative action in respect of an employee's employment".

4. In this regard, the Current Act under section 5(4) already provides satisfactory exclusions for psychological claims.

RECOMMENDATION 2

The reasonable administrative action exclusion should be excluded from the Bill with the exclusions in the Current Act maintained.

4. MANDATORY AUTHORITY FOR COLLECTION AND DISCLOSURE OF INFORMATION (cl.34 of the Bill)

A. The CFMEU does not support compelling workers, by way of mandatory irrevocable 'consent' authority, to disclose all relevant information associated with a workers' compensation claim as proposed in the Bill:

1. Under the current system, authorities for the disclosure of information are executed by workers voluntarily, with authority able to be refused, qualified or withdrawn by the worker at any stage.

2. The concept of mandating an authority to provide documents is oxymoronic, nonsensical and inconsistent at best.

3. The prohibition on employers and insurers seeking access to any and all documents such as medical records that (may) not be relevant to the injuries claimed are in place to provide workers with dignity, privacy and are consistent with recognised legal principles associated with the rules of evidence. The intention of the prohibition is to limit employers from seeking documents unrelated to the proceeding and/or not for a legitimate forensic purpose and importantly not to deprive workers from accessing compensation, notwithstanding the non-provision of documents and materials.

4. Further, under the Current Act, where a dispute arises between the employee and insurer as to the relevance of evidence, a power exists to compel an entity (including the employee) to disclose documents or materials, following determination by a recognised Arbitrator. During that process the Adjudicator will have regard to whether or not that request is reasonable in the circumstances and be guided by established principles of law, including but not limited to the equity and the substantial merits of the request.

5. In these circumstances and having regard to the principles of procedural fairness, one has to consider the utility of such a reform. The system

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under the Current Act strikes the right balance and is consistent with other jurisdictions.

RECOMMENDATION 3

Mandating that workers sign an irrevocable consent authority be revoked in the proposed Bill.

RECOMMENDATION 4

Maintain the system under the Current Act with respect to the collection of relevant information from the worker.

5. DEEMED COMPENSATION PAYMENTS (cl. 37-45 of the Bill)

A. The CFMEU does not support the introduction of the obligation on employers and insurers to make provisional payments to a worker in circumstances where a decision on liability is deferred or not made within a prescribed time as proposed in the Bill:

1. With respect to compensation payments, the Current Act prescribes:

   i) a period of 14 days in which an insurer is required to undertake action with respect to a compensation claim to ensure expeditious processing of workers' compensation claims; and

   ii) in circumstances of an omission by the insurer to give statutory notice within 14 days entitles the worker to weekly payments to be paid by the employer/insurer.

2. In contrast, the Bill intends to extend that period to 28 days and only requires the employer/insurer to make provisional payments until such time as a liability determination is made.

3. Whilst (prima facie) the concept of provisional payments appears advantageous to injured workers relying on the workers' compensation system due to a workplace injury, provisional payments could be used by employers/insurers as a sword to delay making a decision on the workers primary claim for compensation. This is particularly the case where, during the period receiving the provisional payments, the worker is restricted from pursuing conciliation or advancing the claim at all during the same period (as is proposed in the Bill).

4. In circumstances where expedient resolution to workers' compensation claims without undue delay is of critical importance (particularly where injured workers are psychologically, physically and financially vulnerable) reform which affords further opportunity for prevarication should be repelled.

5. The existing provisions under the Current Act are sufficient.

RECOMMENDATION 5

Incorporate into the Bill, the existing compensation scheme under section 57A of the Current Act.

6. INCOME COMPENSATION (cl.56 of the Bill)

A. The CFMEU does not support the concept of step-downs in any form. Workers injured at work should not be subject to disadvantage through the periodic reduction of compensation entitlements:

1. The Bill proposes to reduce an injured worker's rate of compensation payments to 85% of the calculated rate after a 26-week period. This step-down provision will apply to ALL workers.

2. In contrast, the Current Act limits an injured worker's rate of compensation to 85% of the calculated rate of compensation after a 13-week period, ONLY for those workers who are not covered

by an award or an industrial agreement (which is a very limited number of workers).

3. Notwithstanding that the proposal in the Bill works to extend the period to which the step-down shall apply (from 13 weeks to 26 weeks), the Bill also broadens the scope of the step-down's application.

4. Under the Current Act, the majority of workers are either covered by an award or by an industrial agreement, therefore excluding the application of the step-down. The proposal under the Bill will disadvantage workers, capturing low paid workers that are employed under an award or baseline industrial agreement.

5. A 2020 study by Monash University's School of Public Health and Preventative Medicine entitled: *Step-downs reduce workers' compensation payments to encourage return to work: Are they effective?*, examined step-downs and found that:

   "step-downs have negative side effects on claimants. They have been linked to financial strain, which could worsen outcomes or even delay scheme exit, particularly later in the process. Further, economically-motivated return to work such as that driven by compensation benefits can increase the likelihood of reinjury."

6. The study further found that:

   "step-downs have an anticipatory effect, leading some workers' compensation recipients to leave the system early in anticipation of a reduction in income. However, the effects are small and probably short-lived. Step-downs may still reduce costs to workers' compensation systems, which is legitimate policy goal. However, our findings suggest step-downs have a practical significance and are generally ineffective as a return to work initiative."

7. There is no compelling evidence that step downs incentivise a return to work. They are ineffective, regressive and should not be supported. The principal that a worker's rate of weekly compensation payments should be commensurate to what the worker would have earnt but for the workplace injury may be supported. There should be no disadvantage to the worker as a result of injury at work.

8. Further, the Bill does nothing to increase weekly compensation payments for injured workers. Currently, high wage earning workers are disadvantaged because their entitlements reach the cap after approximately 2 years, whereas a worker on an average weekly income does not reach the cap until a 4 to 5 year period.

9. There is no reason why a worker on higher wages should not have the benefit of a similar recovery period.

RECOMMENDATION 6

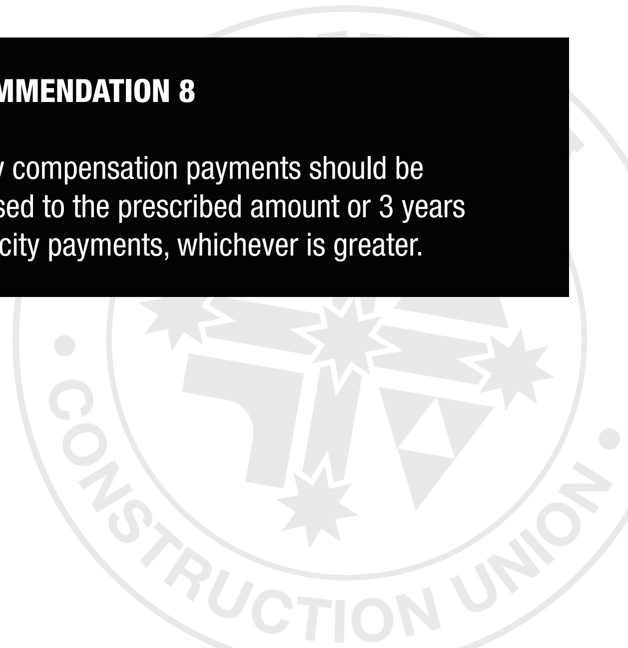
Injured worker's compensation payments should not be subject to any step-downs.

RECOMMENDATION 7

Injured worker's compensation payments should reflect what the worker would have earnt, but for the workplace injury.

RECOMMENDATION 8

Weekly compensation payments should be increased to the prescribed amount or 3 years incapacity payments, whichever is greater.



7. RETURN TO WORK AND REDUCTION / SUSPENSION OF PAYMENTS (cl. 5, 165 of the Bill)

A. The CFMEU does not support the redefinition of 'return to work' and the definition of 'suitable employment' in the Bill:

1. The definition of suitable employment (in particular) could disadvantage the worker as it may capture return to work programs established by the employer.

2. The Bill creates an obligation on the worker to provide each progress certificate of capacity to the employer or insurer with the prescribed period of 7 days. It seems that the consequence of the worker not complying with this requirement would enable the employer to make an application to suspend payments of that worker. This is an onerous requirement for workers with limited capacity to adhere to the timeframe due to their injury, limited technological capacity and the fact usually, the worker relies on a third party such as a medical office to provide relevant medical documentation to the employer or insurer.

RECOMMENDATION 9

The requirement for the worker to provide each progress certificate to the employer or insurer within a prescribed 7 days should be removed from the Bill.

8. VOCATIONAL REHABILITATION

A. The CFMEU does not support the reclassification of vocational rehabilitation as a cost for which the employer is responsible under the Bill.

1. Under the Current Act, the worker is able to select their own rehabilitation provider, whilst under the Bill, the employer may establish the return to work program.

2. In order to maintain independence and impartiality, the workers vocational rehabilitation provider should not be directed by the employer as proposed by the Bill.

3. With the Bill in its current form, it has the potential to result in vocational rehabilitation being brought 'in house' by employers and reduce the independence of the process.

RECOMMENDATION 10

Vocational rehabilitation in the Bill must remain an expense which can be claimed by the injured worker.

RECOMMENDATION 11

The vocational rehabilitation in the Bill must remain at the sole discretion of the injured worker.

9. COMMON LAW CLAIMS

A. The CFMEU does not support the 15% and 24% whole person impairment (WPI) thresholds consistent with the Current Act and as proposed in the Bill.

1. A court cannot award damages to a worker for an injury sustained at work unless:

   i) that worker makes an election and has been assessed as having impairment of at least 15%; or

   ii) for a worker to qualify for capped or fixed damages impairment needs to be assessed between 15% to 24%; or

   iii) for a worker to qualify for uncapped damages, they must be assessed as having a whole person impairment of 25% or more.

2. The whole person impairment threshold process is arbitrary, tedious and burdensome for workers who have been (sometimes severely) injured. It is designed to unfairly limit and cap the amount to which a worker is entitled to by way of common law claim.

3. Furthermore, the proposed thresholds are inconsistent with other personal injury related legislative frameworks such as in the *Motor Vehicle (Third Party Insurance) Act 1941* **(MVA)** which sets the threshold at 5%.

4. Any threshold inconsistent the MVA is detrimental to workers.

RECOMMENDATION 12

The Bill be amended to lower the whole person impairment threshold to pursue a common law claim to 5%.

RECOMMENDATION 13

The Bill be amended to ensure no reduction in compensation payments when a worker commences common law proceedings.

10. SETTLEMENT OF DISPUTED CLAIMS

A. The CFMEU does not support the prevention or restriction of settlements both of disputed and general claims as proposed Bill.

1. The Current Act allows disputed workers' compensation claims to be settled by agreement of the parties, with the predominant purpose to allow for a cost effective and efficient way of compromising disputes. Settlement is given effect by the worker commencing proceedings in the District Court.

2. In contrast, the Bill seems to restrict the process of settling a disputed claim by requiring the following before settlement can be reached:

   i) a worker register a whole person impairment of 15%; and

   ii) requiring the employer accept liability for a claim and at least 6 months have elapsed since the date of the worker's injury.

3. We expect the proposed restrictions in the Bill will prevent workers and employers/insurers from resolving disputes and have the effect of increasing litigation, increasing arbitration applications and further delaying resolution of claims.

RECOMMENDATION 14

The prevention and restriction of settlement of disputed claims as proposed in the Bill, should not be adopted.

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11. RETURN TO WORK CASE CONFERENCES

A. The CFMEU does not support the introduction of compulsory return to work case conferences as proposed in the Bill:

1. The Bill introduces a compulsory return to work case conferences which the worker is required to attend upon receiving notice from the employer's insurer or the worker's treating practitioner. This is problematic for the following reasons:

   i) Return to work case conferences are intended to apply to workers who are incapacitated. A mandatory requirement compelling an injured worker to attend a conference is onerous.

   ii) An employer and employer's insurer have limited to no capacity in dealing with an injured worker's medical situation. Only the worker's medical professional can manage the worker's health outcomes.

   iii) Under the current Bill, return to work conferences are managed by the vocational rehab provider in conjunction with the other relevant parties.

2. The current system is effective in dealing with return to work conferences.

RECOMMENDATION 15

Compulsory return to work case conferences should not be incorporated into the new legislation.

12. SUPERANNUATION

A. The CFMEU supports superannuation to continue to be paid by employers on all payments of compensation consistent with public sector enterprise agreements.

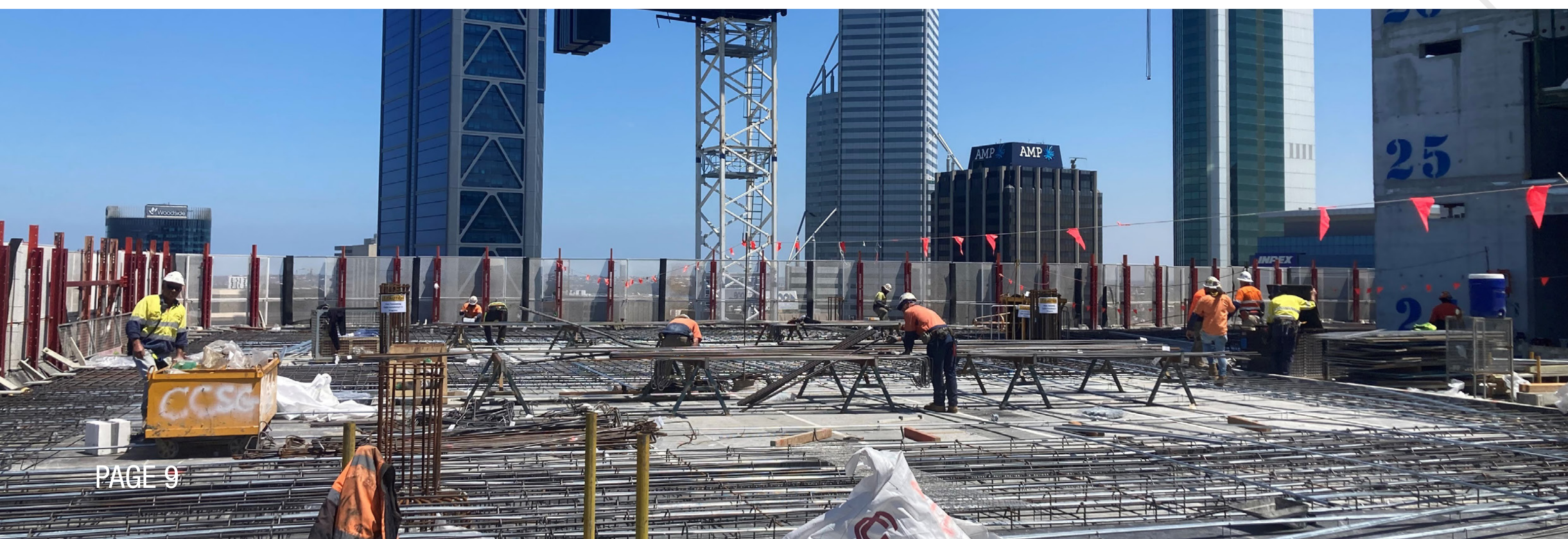
1. Loss of superannuation income as a result of a work related injury is a significant disadvantage to effected workers. This is particularly true for young workers.

RECOMMENDATION 16

Superannuation must continue to be paid by employers on all payments of compensation under the Bill.

13. REGULATIONS

A. The CFMEU notes that the regulations are critical to understanding the full scope of the reform. Without the regulations, it is difficult to understand the impact of the proposed changes in the Bill.



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