Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Submission Template

Bill Clause	Comments
Bill clause number 7 **Info sheet 6**	<u>Reasonable Administrative Action Exclusion for Psychological Injury</u> The current Act excludes stress related claims which result from various administrative actions (mostly disciplinary) undertaken by a worker's employer, or that are due to the worker not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to their employment. The Bill extends this exclusion to any psychological or psychiatric disorder arising out of administrative action, as defined. - Administrative action includes general performance management, along with the other matters that are specified in the current Act relabelled as: counselling action (formal or informal), suspension action and disciplinary action (formal or informal) *There needs to be further information and clarification provided on this clause with specific regulations, particularly on the psychological injury exclusion such as pre-existing chronic conditions being impacted by the employer's actions, when non-work related factors are the main cause of the injury and if so, should liability be present for the employer (and at what level given the work was less of the cause).*
Bill clause number 20, 26-28, 545 **Info sheet 8**	<u>Claiming Compensation</u> The Bill removes the requirement for workers to give notice of injury in addition to making a claim for compensation and requires employers to inform workers of the right to claim compensation. *The worker not being required to serve notice of injury on their employer can thwart or hinder the employer in being able to provide notice to the worker of their right to compensation (a requirement under this Bill), limit the employer's ability to undertake work, health and safety investigations in a timely manner (as required by WHS legislation), limit the employer's ability to provide appropriate support to the worker which may impact the time required away from their work and, limit the employer from ensuring a safe work environment for all workers ie provision of their duty of care.*
Bill clause number 29, 30, 31, 37-45, **Info sheet 11**	<u>Provisional Payments</u> The Bill introduces a new obligation on insurers and self-insurers to make provisional payments to a worker if a deferred decision notice was initially given but the insurer or self-insurer has not given a liability decision notice before the prescribed days (the provisional payments day). - A liability decision notice is required to be given within 14 days (7 days for employer to give the worker's claim to the insurer and then an additional 7 days for the insurer to give the worker a liability decision notice or deferred decision notice)

Bill Clause	Comments
	- Liability is deemed to be accepted and compensation is to be paid if a liability decision notice is not given or given late - If a liability decision notice is not given by the day prescribed by the regulations as the 'provisional payments day', provisional payments are payable. The prescribed provisional payments day is likely to be 28 days from when the claim was given to the insurer. - If a liability decision notice is not given by the day prescribed by the regulations as the 'deemed liability acceptance day' (likely to be 90 days from when the claim was given to the insurer or self-insurer), the insurer or self-insurer is deemed to accept the employer is liable, including income payments of compensation if the worker has an incapacity for work. *Claims will be managed in a timely way in terms of determining liability with these changes. However, there is concern regarding provisional payments being made to the worker at 28 days (prescribed day) prior to being able to determine liability given they are not recoverable from the worker. This will impact workers compensation premiums. Suggest extension of the provisional payments day to 90 days after the insurer receives the worker's claim, to make it consistent with the deemed liability acceptance day.* *Also, should medical information not be provided to the insurer to assist in the determination of the claim, the employer is unfairly liable as the claim will be automatically accepted at 90 days (liability acceptance day) when the delay in medical information from the worker's treating practitioners may lead to acceptance of a claim that is not due to the work the worker was undertaking.*
Bill clause number 10, **Info sheet 5**	<u>Prescribed (Presumptive) Diseases</u> The Bill provides for regulations to be made which establish a presumption of work-related injury for prescribed diseases contracted by workers in prescribed employment. *Should this include COVID-19 for healthcare or aged care workers, it is recommended that the presumption of work-related injury should be linked to contract tracing identifying a positive COVID-19 case in the workplace during a time when the healthcare worker was at work.*
Bill clause number 62 **Info Sheet 14**	<u>Status of Leave While Entitled to Income Compensation</u> The Bill clarifies the status of sick leave, annual leave and long service leave (and leave accrual) while a worker is entitled to income compensation. - the worker is entitled to take annual leave, long service leave - the worker accrues entitlements to annual leave, long service leave and sick leave while receiving income compensation - the worker is not entitled to take sick leave *This clause should be rejected.* *The issue is that the worker can accrue sick leave whilst on workers compensation whilst not being able to access it when on workers compensation. Therefore, the injured worker can be fit with some capacity for work in relation to their workers compensation injury/illness but unwell with a non-compensable illness eg influenza or back complaint and remain on compensation income payments and not have to access their sick leave. Income compensation for the work related injury should not be paid if the worker is solely not undertaking work due to other non-compensable reasons (that is, if the only reason they are not at work completing either their full role or suitable duties is due to the non-compensable illness/injury). Therefore, it is not reasonable for a worker to accrue all leave entitlements whilst receiving income compensation (unless they are to suspend compensation payments when taking leave).*

Bill Clause	Comments
	If workers seek to utilise a leave entitlement (sick leave, annual leave etc), their income compensation should be automatically suspended for that period.
Bill clause number 64 - 68 **Info Sheet 21 and 22**	<u>Settlements</u> The Bill clarifies the settlement pathway from eligibility through to registration and scrutiny of settlement agreements. Registration of a settlement agreement under Part 2 Division 11 is the only pathway to settle or finalise a workers' compensation claim. An application to register a settlement can only be made if the following criteria are met, unless there are exceptional circumstances: - the insurer or self-insurer has accepted liability to compensate the worker for the injury, or an arbitrator has made a determination on that liability; and - a period of at least 6 months has elapsed since the date of the worker's injury. The regulations will provide for settlements to be made before 6 months in prescribed circumstances with the following indicative circumstances listed: - a claim is made by a worker under a temporary work visa where return to work is not possible or the worker is required to return to their country of origin - the claim has been accepted and the worker is leaving the Commonwealth either permanently or indefinitely - liability for the claim is contested in more than one jurisdiction (a cross border matter) - a claim relating to a dust disease - any claim where a medical practitioner certifies the worker's death is imminent - where the claim relates to a psychological injury and a medical practitioner certifies that delayed resolution of the claim is likely to be detrimental to the worker's health - a conciliator has issued a Certificate of Outcome. *Prescribed circumstances for settlement of a claim before 6 months needs to be more than the listed circumstances in Information Sheet 21.* *Consideration should also be provided to:* - *if both the injured worker and the employer (or insurer on behalf of the employer) would like to settle the claim eg worker wants to move on and employer wants to reduce risk or claim costs etc* *Additional provisions are needed to allow for a commercial (without prejudice and without acceptance of liability) resolution to declined, deferred decision or disputed claims.*
Bill clause number 5, 49, 64, 165 **Info Sheet 23**	<u>Reducing or Discontinuing Income Compensation – Return to Work</u> The Bill provides for a new provision for reducing or discontinuing income compensation payments to a worker based on the worker having returned to work and deriving earnings. - The employer must give the worker notice in the approved form of why payments are being reduced or discontinued and specify the amount of income compensation that will be paid to the worker for any partial incapacity. *Does this mean each time productivity changes with a graduation in the RTW Plan, formal notice is required to go to the worker regarding their wages being partially WC and the remainder being 'normal' wages for the role being completed. This will require a high administration burden for both the employer and insurer with ensuring letters are sent prior to the upgrade in RTW Plan stage (this can happen weekly). Would a worker's payslips provide this information and be sufficient / enough as the required notification?* *Recommend proposal that income compensation to be suspended until such time as they comply, for workers who:*

Bill Clause	Comments
	- *refuse to comply with lawful directions from their employer, such as failure of healthcare workers to obtain vaccinations as mandated by the relevant authority,* - *fail to respond to communications related to return to work activities within seven days.*
Bill clause number 26, 159,162,169, 170, 171 **Info Sheet 29**	<u>Certificates of Capacity</u> The Bill clarifies arrangements for the issuing of certificates of capacity which are integral to claim assessment, medical management of a worker's injury and return to work planning. - After a claim is made, the Bill provides that a worker is required to provide any 'progress' certificate of capacity to their employer / insurer within 7 days. This is to ensure the relevant insurer is informed of any changes to the status of the worker's injury, capacity for work, medical and health treatment, or return to work options. - The Bill also provides for regulations to authorise a health practitioner (other than the worker's treating medical practitioner) to issue a certificate of capacity in specific circumstances. It may be necessary to permit nurse practitioners or certain other health practitioners to certify minor or short duration lost time claims, or to prescribe initial treatment for workers in remote or regional areas. *What are the parameters around the 7 day requirement for a worker to submit a certificate of capacity? Are there any consequence or actions to be undertaken if the medical certificate of capacity is not provided to the employer / insurer within the 7 days?* *What will be the regulations or determining factors of who can issue certificates of capacity ie what will be the prescribed circumstances? For example, in a case of a treating doctor's limited availability, would these circumstances allow for an alternate health provider to issue a certificate (possibly without the injury/illness history)? What would stop a worker from getting a certificate of capacity from an allied health practitioner that does not have the patient history or up to date medical reports etc. Given a GP is required to make a referral to a specialist or scans, this information will therefore need to return to the GP and this GP should be the issuer of any certificates of capacity and not one of the other treaters of this worker.* *Furthermore, it is recommended that there should be regulations on the medical practitioners' obligations including timeframes in which they need to respond to workers compensation stakeholders (insurer and employer) and providing clear diagnoses on Certificates of Capacity (back pain or stress are not diagnoses).*
Bill clause number 5, 158 - 163, 165, 166, 168 **Info Sheet 33**	<u>Injury Management Obligations – Employer</u> The Bill clarifies an employer's return to work and injury management obligations including obligations to maintain a worker's pre-injury position or provide suitable employment. - The Bill maintains the existing obligation for employers to make the worker's preinjury position available (unless it is not reasonably practicable to do so) or provide suitable employment. The obligation runs for 12 months from the date of the worker's incapacity for work (the employment obligation period). - Suitable employment (cl. 165) includes returning to work in a position that has been modified or created to accommodate a worker's incapacity. It also includes the position the worker was employed in before becoming incapacitated but with a modified range of duties, working days or hours. - The Bill also clarifies a worker cannot be dismissed solely or mainly due to the worker's incapacity for work and cannot be dismissed for any reason unless the employer has given the worker notice in the approved form at least 28 days before the dismissal takes effect. *Concerns have been raised that there will be many workers in the same role that all have permanently modified roles which could put patient care at risk eg if inherent requirement of a*

Bill Clause	Comments
	role is not met such as the ability to perform CPR, this increases risk for other staff and the patient. This also will create multiple situations where some workers will get medical approval for them not to complete some tasks in their role due to varying reasons (potentially other than due to their injury) which will impact operation of the department etc. *Clarity is needed on whether an employer will be expected or compelled to offer a modified position or create a position to accommodate a worker's incapacity. It is recommended to reject any proposal to compel an employer to do so.* *If a worker cannot return to their pre-injury role, and there is no alternate suitable employment, then dismissal might be suitable. If this is not permitted, is the Bill outlining that the worker remains employed in the pre-injury position yet does not undertake the role until they secure another role with another employer?* *Recommend that should the worker fail to participate in return to work activities, their compensation income can be suspended by a conciliation officer.*
Bill clause number 565, 566 **Info Sheet 35**	<u>Workplace Rehabilitation</u> The Bill characterises workplace rehabilitation as an injury management expense and provides for the approval and regulation of workplace rehabilitation providers. - Regulations will address when workplace rehabilitation services should be provided, services that can be provided, the process for selecting providers and the maximum amount payable for workplace rehabilitation services in relation to the worker's injury. *If Workplace rehabilitation is to be an injury management expense of the employer, not a form of compensation, the employer should have the right to choose the workplace rehabilitation provider and the worker should not be able to change the workplace rehabilitation provider. Further consultation is required following drafting of the Regulations.*
Bill clause number 34 **Info sheet 10**	Consent Authority The Bill provides for a new consent authority mechanism for the collection of information related to a worker's injury to enable the injury, claim and return to work to be managed effectively. *The consent authority should include agreement for the collection of information related to the worker's prior claims with previous insurers and employers. It should also allow for details of previous similar injuries or injuries to the same body part.* *The consent authority to collect and disclose relevant information cannot be revoked is agreed to.* *Suggest that should the worker not provide consent for relevant medical information to be collected and released, the claim can not be accepted ie automatically the claim will be declined.*
Bill clause number 505, Part 10, Division 2 **Info Sheet 53**	<u>Disclosure of Information</u> The Bill addresses various circumstances where information disclosure is permitted or prohibited, including a new provision that prohibits disclosure of a worker's claim history for pre-employment screening purposes. - The Bill prohibits disclosure of information about a worker's claim for compensation (or claim history) to another person for the purpose of pre-employment screening. The Bill also provides that a worker cannot be required to disclose information about a compensation claim by the worker for the purpose of selection for employment. - The Bill prohibits workers being required to disclose previous workers compensation claims to employers or their agents seeking access to claim records as part of pre-

Bill Clause	Comments
	employment recruitment practices. The prohibition does not apply in relation to information disclosure to facilitate return to work programs or the provision of suitable employment for workers that have an incapacity for work. *Employers are prohibited from seeking information about previous compensation claims as part of pre-employment screening. Can the questions still be asked but not required to be completed by the worker? Ie it is at the discretion of the worker as to whether they will provide the WC information.* *This clause limits the employer in understanding the ability of an applicant to perform the inherent requirements of the prospective employment. It also may put the other employees at risk of injury and not allow the employer to provide a safe working environment should the worker's previous workers compensation injury impact their ability to complete the tasks of the role as required.*
Bill clause number 55	<u>Weekly Rate of Income Compensation - Seasonal and casual workers</u> Clause 55(1) can derive the pre-injury weekly rate of income for all workers, regardless of their employment status or period employed (full-time, part-time, casual, intermittent employment). If clause 55(6) was deleted, the earnings of seasonal workers would be calculated under clause 55(1), like any other worker. However, the default method would produce a different pre-injury weekly rate of income for a seasonal worker because their earnings would be averaged only over the period they worked in the position. For example, if a seasonal worker was working for an 8 week period over January and February and was receiving a flat rate of $1,000 per week they would receive $1,000 in income compensation per week if incapacitated during that 8 week period (not $153 per week in the earlier example if clause 55(6) is retained). The deletion of clause 55(6) would have the effect of treating seasonal workers no differently to workers employed on fixed term contracts of less than one year, or workers on permanent contracts that have been employed for less than one year. Feedback is invited on the most appropriate methodology for calculating the pre-injury earnings of seasonal and casual workers (in order to derive the weekly rate of income compensation payable) and whether cl. 55(6) - which applies a proportionate reduction in the preinjury rate of earnings - should be retained, clarified further or deleted. *A suggestion would be for the worker to receive $1,000 per week (rate at which they would be paid if able to complete the work if not for the injury) for a period of 8 weeks (the length of period that they would be employed for or undertaking the work). That is, seasonal workers should receive the usual weekly rate / salary, but this should be capped at the season's total wage rate.*