# Workers Compensation and Injury Management Bill 2021 - Consultation Draft

Chamber of Commerce and Industry WA

**30 November 2021**

# We believe in good business

## Contents

## Introduction

1. The Chamber of Commerce and Industry of Western Australia **(CCIWA)** is the peak organisation advancing trade and commerce in Western Australia. We want the best for communities across the State. We're fundamentally committed to using our insights to develop and advocate for public policies that advance trade and commerce, and that reflect the needs of all our stakeholders.

2. CCIWA welcomes the opportunity to make a submission to the consultation on the *Workers Compensation & Injury Management Bill 2021* (**the Bill**) which is intended to replace the existing *Workers Compensation & Injury Management Act 1981* **(the Act)**. We commend WorkCover WA for the inclusive and comprehensive approach that has been adopted. This submission focuses on key changes proposed by the Bill.

3. Our workers' compensation system is intended to protect both workers and their employers from the financial impact of work-related injuries. It is important for reforms to the workers' compensation system to take a balanced approach which reflects the interests of both of these groups.

4. The amendments in the Bill are largely drawn from the recommendations arising from the *Review of the Workers Compensation & Injury Management Act 1981- Final Report* **(2014 Review)** which made over 170 recommendations after significant consultation with stakeholders.

5. Overall, the majority of the amendments proposed by the Bill will represent incremental improvement in the operation and efficiency of the workers' compensation system. These are welcome reforms that will assist workers and employers in managing claims and promoting successful return to work.

6. Regrettably these benefits will be eroded by a number of changes that will increase the costs of claims and insurance premiums with no demonstrated benefit to the system overall. These include:

    6.1. doubling the period before income payment step down from 13 to 26 weeks. The estimated 1.63 per cent increase to workers compensation premiums arising from this change is likely to be significantly higher as the average duration of claims increases;

    6.2. doubling the cap on medical and health expenses from 30 to 60 per cent of the prescribed amount. Again, we are concerned that the estimated impact on premiums of between 0.63 to 1.4 per cent underestimates the true effect of these changes as the level of unnecessary medical treatment increases;

6.3. changes to the management of pended claims will result in increased number of disputed claims, increasing the costs of conciliation and arbitration;

6.4. limiting settlement pathways will result in longer claim durations, ultimately increasing the cost of settled claims;

6.5. preventing workplace rehabilitation being categorised as part of compensation will push the costs of these services onto employers, with the greatest burden being placed on small businesses.

7. A number of these amendments were not recommendations arising from the 2014 Review and have not otherwise been subject to feedback from major stakeholders. No justification has been provided for these proposed reforms, nor consideration of the interests of all relevant stakeholders.

8. As part of this consultation, we encourage WorkCover WA to undertake comprehensive risk review of these amendments to assess their full cost and the potential for unintended consequences.

## Part One - Preliminary

### Reasonable administrative action

9. Core to the employment relationship is the ability for an employer to manage the performance and conduct of their employees and to take reasonable steps to achieve this without the potential for a workers' compensation claim.

10. The existing exemption for stress related diseases arising from reasonable management action is an important element of the existing Act and should be updated to reflect ongoing developments.

11. One of these is developments is our understanding of mental health disorders, which has progressed from the simple notion of stress. The Bill addresses this to include any psychological or psychiatric disorder, which better reflects the broad nature of psychosocial claims that may be made through the workers' compensation system.

12. Likewise, the Bill also recognises that reasonable administrative action undertaken as part of the performance management process is not limited to disciplinary action. We welcome the inclusion of other administrative action, such as performance appraisals and counselling. These are valid administrative actions that are focused on preserving the employment relationship. The narrow definition currently contained in the Act can act as a disincentive for employers to consider

these options in preference for a formal disciplinary process that often results in the termination of employment.

13. However, it is important to note that the current list is not comprehensive and other administrative action, such as mediation or access to developmental opportunities, is not clearly captured. Given ongoing developments in how performance management may be undertaken, we recommend that s7(1) be amended to provide that *"administrative action includes, **but is not limited to**, any of the following actions…"*.

## Prescribed (presumptive) diseases

14. The Bill establishes a new provision which allows for regulations to deem certain diseases as a presumptive work-related injury for workers in specified industries or occupations.

15. Historically, this has been achieved through amendments to the list of industrial diseases in Schedule 3 of the Act. Under this approach a decision to include a disease is subject to parliamentary scrutiny which allows for appropriate consideration and debate as to whether a disease meets the criteria for inclusion within this list.

16. The proposed amendment removes that oversight and will provide the relevant Minister with broad discretion to add or remove industrial diseases from the prescribed list.

17. In 2020, Parliament passed the *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020* which allowed for the deeming of prescribed diseases by regulation. The purpose of this Bill was to allow for COVID-19 to be listed as a prescribed disease for health care workers and was passed with limited debate as part of Parliament's approach to the passage of pandemic related bills.

18. It is therefore appropriate that this reform be given appropriate level of consideration, noting that this issue was not a recommendation arising out of the 2014 review and was not subject to significant parliamentary debate. It therefore can't be considered maintenance of the status quo.

19. We do not believe that there is a need to allow for diseases to be prescribed by regulations, noting that:

    19.1. the established process of varying the Act does not create a practical barrier to timely additions to the list of prescribed diseases, whilst establishing accountability for the relevant minister in ensuring the threshold questions for this designation are met;

19.2. the proposed five yearly review of the legislation provides another mechanism for an ongoing consideration of the list of prescribed diseases.

20. Of particular concern is the lack of appropriate safeguards to ensure the provision is appropriately applied. As a minimum, the Bill should establish criteria that must be considered in making any such regulation, including:

    20.1. there is a clear causal link between the disease and occupational exposure;

    20.2. there are clear diagnostic criteria, which make it clear whether or not the claimant has the disease that is the subject of the claim;

    20.3. a considerable proportion of the cases of that disease in the overall population, or in an identifiable subset of the population, are known to be due to the relevant occupational exposure;[1]

    20.4. the Minister has consulted with all relevant stakeholders.

## Worker and employer

21. The proposed amendment to the definition of worker to align it with the established definition of an employee for the purpose of "pay as you go" (PAYG) withholdings under the *Tax Administration Act 1953 (Cth)* is a sensible amendment that will significantly reduce the current complexity associated with determining who is a worker for the purpose of worker's compensation.

22. However, we have concerns with respect to the proposed amendment that would allow regulation to be used to extend the definition of worker.

23. The notion of who is, or is not, a worker is central to the operation of the Act. As a form of delegated legislation, the role of regulation is to support the operation of the relevant legislation, not to fundamentally alter its scope.

24. It is also noted that the consultation guide identifies that consultation will occur as part of the development of any such regulations. In the absence of an expressed obligation for the relevant Minister to do so, no such guarantee can be made.

25. CCIWA is of the view that fundamental amendments to the scope of an Act should only occur through legislative amendment and not by regulation. Such amendments should be the role of Parliament, and not left to the discretion of an individual minister.

[1] Safe Work Australia (2015) *Deemed Diseases in Australia*, pxii.

## Part 2 – Compensation for injury

### General principles

26. CCIWA supports the proposed amendment to clarify the liability status for workers injured outside of Australia by reinstating the 2-year limit on absences from Australia that previously applied under the Act prior to 2004. It should be beyond doubt that there is no connection to the state in the case of workers who have never resided in Australia or have continually resided outside of the country for more than 2 years.

27. However, we note that in other situations the Bill still requires that where a work-related injury occurred outside of WA, it must be connected with employment in this state to bring a claim under this Act. This important principle needs to be retained to maintain the integrity of the system.

28. The Bill also proposes the inclusion of a new obligation on employers to inform workers of the right to claim compensations within 14 days of becoming aware that an employee may have suffered an injury.

29. This amendment imposes an unnecessary administrative burden and cost on employers that is unlikely to have any meaningful impact on an employee's understanding of their ability to make a workers' compensation claim, noting that the entitlement is well understood. [2] It constitutes additional unnecessary red tape which runs contrary to the objective that "*reducing red tape, so that businesses and individuals waste less time and money on unnecessary compliance, is a high priority for the Government*".[3]

30. It is also unclear how this requirement will pragmatically address the perceived risk of alternative compensation arrangements being made. To the extent that this is an issue of concern, then practical strategies such as education and proactive enforcement will be a more effective approach.

[2] To the extent that there are groups within the community where these entitlements are not well understood, such as new migrants, then it should be the role of WorkCover WA to undertake necessary education campaigns to raise awareness of the scheme.

[3] https://www.wa.gov.au/organisation/department-of-treasury/red-tape-reduction

## Claim process and provisional payments

31. CCIWA recognises that it is important that workers' compensation claims are managed in a timely way. However, we do not believe that the proposed amendments to pended claims will address this issue. It fails to recognise the variety of reasons why claims are pended and that workers may often delay providing information which the insurer needs to enable decisions to be made. The recommendations also don't adequately deal with obstructive workers given that the conciliation and arbitration services provided under the act do not allow for a timely resolution of matters.

32. The proposed amendments require provisional payments and deem liability of deferred claims after 28 and 90 days respectively of a claim being made, are likely to result in a significant increase in the number of claims that are denied. Where an insurer has insufficient information to determine whether a claim should be accepted by the prescribed dates then there is a greater likelihood the claim will be denied prior to the provisional payment date, thus requiring the applicant to provide the required information as part of the disputed review of the claim. This will put greater pressure of the conciliation service which is already struggling to deal with disputes in a timely manner.

33. In order to improve the timeframes for the assessment of workers' compensation claims in place of the proposed changes we recommend amending the process for making claims to ensure that all information necessary for the proper assessment of a claim is provided in a timely manner.

## Consent authority

34. A mandatory, non-revokable, consent authority is an essential requirement for assessing a workers' compensation claim, managing the claim, and ensuring a safe return to work. CCIWA supports these amendments noting that the regulations will specify who may disclose and receive relevant information and provide for penalties in the case of its misuse.

## Income compensation

35. In a substantial departure from the recommendations of the 2014 review, the Bill proposes to double the period before income payments step down, from 13 to 26 weeks.

36. The consultation guide provides no justification for this amendment, other than to identify that it was an election commitment made by the WA Government in the closing days of the 2021 election campaign.

37. Rather the proposed amendment is in direct contrast to the conclusion of the 2014 Review which identified that the existing 13 week step down should be retained, noting that:

*"The application of a step down in weekly compensation is a long standing element of workers' compensation schemes across Australia. The step down plays a key role in encouraging workers to return to work. Removing this incentive could result in deterioration in return to work rates and increases in claim costs"*[4]

38. It is noted that WorkCover WA estimates that this amendment is anticipated to increase the cost of premiums by 1.63 per cent. No justification has been provided as to how this amount has been calculated and whether it has taken into consideration the anticipated increase in the average duration of claims as foreshadowed in the 2014 Review.

39. The impact of increasing the step-down period on the return to work rate is also noted in the national Comparative Performance Monitoring Report, which identified that:

*"Each jurisdiction faces varying challenges in their endeavors to improve return to work rates. Some drivers of return to work are defined by legislation and can only be influenced by the nature of the scheme design (whether it is short or long term in nature). For example, the benefit structure can influence return to work, as can the associated step down provisions and legislative differences regarding early claims reporting, employer obligations and common law arrangements."*[5]

40. WA's current return to work rate of 82 per cent is in line with the national average. This will drive the performance of our worker's compensation system below the national average, in line with the substandard targets achieved by NSW, Victoria, Tasmania and the NT.

## Status of leave entitlements

41. The 2014 review recommended that the general intent of the leave provisions be retained with the language clarified to provide:

    41.1. a worker may access accrued leave entitlements while incapacitated;

    41.2. a worker may receive leave entitlements and weekly compensation concurrently;

    41.3. leave cannot be paid in replacement of weekly compensation.

[4] WorkCoverWA (June 2014) *Review of the Workers Compensation & Injury Management Act 1981- Final Report*, p84

[5] Safe Work Australia (2021) *Comparative Performance Monitoring Report – Part 3 – Premiums, Entitlements and Scheme Performance*, p33

42. However, the Bill goes beyond these recommendations by including a new provision which provides that a worker accrues entitlements to annual leave, long service leave and sick leave that the worker would have accrued if the worker had not been entitled to receive compensation.

43. No justification has been provided for why the proposed amendments go substantially beyond the recommendation arising from the 2014 review.

44. The requirements regarding the accrual and taking of leave entitlements, including personal/carer's leave, annual leave and long service leave, are matters that are most appropriately addressed through the relevant industrial relations legislation.

45. The principal legislation that provides for these entitlements already comprehensively deals with the issue of taking and accrual of these benefits. The Bill will create greater complexity by establishing multiple legislative sources for the establishment of these entitlements, which in turn will increase the risk of unintentional non-compliance.

46. This confusion would be exemplified with respect to its interaction with the *Fair Work Act 2009 (Cth)* which underpins the entitlement to annual and personal leave for the majority of the private sector workforce. Given that the national legislation already deals with this matter, the amendment to the Act would have no effect as a result of the interaction between state and federal legislation.

47. As a general principle, we are also concerned that the accruing of leave whilst an employee is in full receipt of worker's compensation payment acts as a disincentive in encouraging workers to return to work. As previously noted in this submission, the 2014 review expressed concern about amendments that would result in deterioration in return to work rates and increases in claim costs. This would be the effect of these amendments.

## Compensation for medical and health expenses

48. The Bill proposes to increase the cap on medical and health expense from 30 to 60 per cent of the prescribed amount, which is estimated to increase the cost of workers' compensation premiums by 0.63 to 1.4 per cent.

49. No justification has been provided on the need to increase this cap. In particular we note that this was not a recommendation arising out of the 2014 review and as such there has been no opportunity for consultation or discussion on this matter. Whilst the Government has identified that it was an election commitment, we also note that there was no debate or discussion on this proposed amendment in the lead up to the election.

50. Increasing the cap on medical and health compensation will not necessarily result in better health outcomes for workers, but will provide a direct monetary incentive to health professionals.

51. This was identified as a significant issue arising out of the *Review of Medical and Associated Costs* report on the Western Australian workers' compensation system which *"found evidence that some workers with compensation claims are receiving excessive medical, pharmaceutical, physiotherapy and other services, which are of questionable medical benefit to an injured worker"*.[6]

52. Increases to the cap on these expenses is likely to exacerbate this issue and result in a significantly greater impact on premiums than what has been estimated.

## Settlement of compensation claims

53. The Bill proposes to amend the Act to limit the use of common law pathways to settle workers' compensation claims in line with the recommendations from the 2014 review.

54. The primary driver of this recommendation appears to be that common law settlements do not provide WorkCover WA with the same level of oversight as that available through the statutory settlement pathway and hence there is concern that settlement may be used in a manner that undermines the system.

55. However, there was no evidence arising out of the 2014 review that suggested this is the case. Rather the review identified that the use of common law settlements:

    55.1. provides an inexpensive and expeditious option for settlement;

    55.2. enables greater flexibility in settlement terms;

    55.3. enables resolution of claims where liability is not accepted which:

        a) reduces protracted and costly disputes; and

        b) is of benefit to all parties.[7]

56. These are valid comments regarding the inflexibility of the statutory settlement pathway which have not been addressed through the Bill. The proposed amendments will therefore result in increased costs to the system and longer claim duration unless the Bill also addresses the barriers to the use of the statutory settlement scheme.

[6] WA Government (2000) Media Statement - *Medical costs review in workers' compensation system released for comment*.
[7] p126

57. To address these concerns, the statutory settlement system needs to be reformed to:

    57.1. allow for parties to negotiate a settlement at any time of the claim;

    57.2. allow for the settlement of a claim where liability has not been accepted;

    57.3. facilitate timely finalisation of settled claims;

    57.4. ensure that in scrutinising settlements, primacy is given to the views of the parties.

## Part 3 – Injury Management

### Employee obligations

58. In order for the workers' compensation scheme to operate effectively, there needs to be clear enforceable obligations for all parties involved. A current limitation of the existing act is that this is not the case with respect to workers.

59. The Bill seeks to correct this deficiency by setting out consequences if a worker fails to meet their duty to:

    59.1. participate in the establishment of a return-to-work programme;

    59.2. comply with reasonable obligation under a return-to-work programme;

    59.3. comply with a requirement to attend a return-to-work conference; or

    59.4. provide progress certificates of their capacity to their employer / employer's insurer within 7 days.

60. The above are very simple obligations that all workers are able to comply with. However, there is a small minority of workers who consistently fail to comply with these obligations, frustrating the return-to-work process and dragging out the duration of the claim. Workers must be an active participant in the proactive management of their own claim, not only to ensure that the system operates effectively, but also to benefit their long term health and financial needs. There is no justification for why these obligations can't be met.

61. The Bill seeks to address this by allowing an arbitrator to make orders to:

    61.1. require the worker to comply with a return to work order;

    61.2. suspend compensation payments;

    61.3. cease the entitlement in the case of repeated non-compliance following an earlier order.

62. Whilst these initiatives are welcomed, their practical effectiveness will be significantly hampered by the time taken for a matter to proceed to arbitration. The current timeframes will mean that such behaviours may continue with impunity for several months prior to a matter being heard, with the proceedings being frustrated by the worker's last-minute compliance with their obligations. For these measures to be effective, their needs to be a fast-tracked process that allows for a conciliator or arbitrator to make such an order within a prescribed timeframe. This approach has been adopted in other jurisdictions, such as the *Fair Work Act 2009 (Cth)* which requires applications to suspend or terminate industrial action to be determined within 5 days of an application being made. CCIWA believes that a similar timeframe should be established through the Bill.

## Making employment available during incapacity

63. CCIWA supports the amendments to the obligations of employers to make employment available during incapacity.

64. The Bill addresses the unintended effect of the existing provision of s 84AA of the Act which required the employer to maintain a person's employment unless the worker was dismissed on the ground of serious or wilful misconduct.

65. The inclusion of s166(2) recognises that there are other reasons that a person's employment may lawfully be terminated and will ensure that the Act operates in a manner which is consistent with the relevant industrial relations legislation.

## Medical examinations

66. The Bill proposes a new provision which prohibits an employer from being present at a medical examination of the worker.

67. CCIWA understands that the intention of this provision is for the purpose of maintaining the workers privacy and dignity during a physical examination, and is not intended to prevent the employer from being present during medical appointments for the purpose of discussing matters such as their capacity to perform light duties, return to work options, etc. The ability for the employer to be present during medical appointments to discuss these matters is an important part of the return-to-work process and it is critical that there should be no suggestion within the Act that this can't occur.

68. However, this intent is not clear in the current drafting of s171of the Bill and we believe that it should be amended to make it expressly identify that the restriction only applies to the physical medical examination.

69. The Bill should also be amended to address circumstances where the worker may wish to have the employer present during a physical examination. Immediately following a workplace injury it may be the employer, or a manager, who initially takes the worker to hospital and in such circumstances the worker may wish their presence for moral support during initial treatment. This is particularly relevant for small businesses where the employer may be a relative of the worker. It would be a perverse outcome if a young worker was unable to have a parent present during a medical examination because they were also their employer.

## Certificates of capacity

70. The Bill proposes establishing limited circumstances in which a person, other than a medical practitioner, may be permitted to issue a certificate of capacity. The explanatory material identifies that the circumstances in which this occurs will be limited to:

    70.1. certifying minor or short duration claims, or

    70.2. prescribe initial treatment in remote areas where there is limited access to medical practitioner.

71. We note that s169 of the Bill does not reflect this intent, and as drafted it is open for regulations to allow other health professionals (eg physiotherapists) to issue certificates of capacity in a broad range of situations.

72. Given the unique geographical challenges of WA, we do not oppose allowing nurse practitioners to issue temporary certificates of capacity in remote locations where a medical practitioner is not available. However, this should be clearly identified within the Act.

73. Allowing allied health professionals to issue certificate of capacity, even for minor injuries, is likely to result in a substantial increase in the number of claims and result in poorer health outcomes for workers. Whilst allied health workers have a role in the treatment of workers, they do not have the necessary training to treat the whole of the injury. This remains the role of a medical practitioner.

## Cooperation with labour hire employers

74. The Bill includes a new provision which will require that a host employer must, to the extent that it is reasonable, cooperate with a labour hire employer to facilitate an employee's return to work.

75. The justification for this amendment is that in some labour hire arrangements a person performs work for a single host businesses for an extended period of time.

76. This ignores that the vast majority of labour hire workers are placed with a host employer for only a short period of time, with less than a quarter of these employees expecting to be with the same employer in 12 months.[8]

77. Consequently, in the majority of labour hire arrangements it is unclear what steps a host employer would be reasonably expected to undertake to co-operate with a labour hire business in managing a workers return to work. There is little that a host employer can do to assist with this process if there is no longer any work to be performed.

78. The lack of discussion in the explanatory material as to what this obligation would look like suggests insufficient consideration has been given to how this requirement would work in practice.

## Workplace Rehabilitation

79. The Bill further seeks to increase the cost of worker's compensation claims by removing the current capacity for workplace rehabilitation to be characterised as part of compensation.

80. This is particularly problematic for small businesses, who are potentially faced with an additional cost of up to $17,000.

81. This concern is overlaid by the experiences of employers and others regarding the performance of workplace rehabilitation services and the effectiveness of some of these providers in effective injury management.

82. The Bill recognises this concern through the improved regulatory regime for workplace rehabilitation providers to establish eligibility criteria for approval and ongoing conditions and performance standards.

83. Ensuring that workplace rehabilitation services positively contribute to effect injury management and workers return to productive employment is an important reform. However, the value of these services currently largely lies with the worker, and as such should be capable of being characterised as part of their compensation.

[8] Gilfillan, G (2018) *Trends in use of non-standard forms of employment*. Department of Parliamentary Services, p 5