Submission
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Workers Compensation and Injury Management Bill 2021 (WA)

Submission to WorkCover Western Australia

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About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia (WA). CME is funded by member companies responsible for more than 88 per cent of the State's mineral and energy workforce employment.[1]

In 2020, the industry reported a record value of $173 billion,[2] with iron ore the most valuable commodity at $116 billion. Petroleum products (including crude oil, condensate, liquefied natural gas, liquefied petroleum gas and natural gas) followed at $27 billion, with gold third at an all-time of high at $17 billion.

The value of royalties received from the sector totalled $12.7 billion in 2020-21, accounting for 31.7 per cent of general government revenue.[3] Contributing to 47 per cent of the State's total Gross Value Added by industry,[4] the sector is a significant contributor to local, State and Australian economies.

Summary of recommendations

CME appreciates the opportunity to provide comment on the *Workers Compensation and Injury Management Bill 2021* (the draft Bill) as part of WorkCover WA's public consultation.

Key CME recommendations are outlined below with further detail in the subsequent sections of this submission.

In addition to those recommendations listed below, CME would also like to endorse the submission being lodged by the Chamber of Commerce and Industry Western Australia (CCIWA) which CME has reviewed as part of our own submission process. CME notes the positions collectively across our two organisations is representative of a significant proportion of industry in this state.

General

- CME supports the principle of modernisation of the Act, provided it does not include unnecessary prescription, and welcomes the opportunity to provide feedback to the draft Bill. CME members are generally supportive of the draft Bill's content, with specific recommendations for improvement provided in the below submission.
- Given the accompanying regulations have not been developed as part of this consultation period, CME recommends that consultation on the draft Regulations occur prior to the finalisation of the Act. CME's full support of the draft Bill is contingent on industry's review of the detail of the accompanying regulations.
- CME welcomes the transparent consultation process that has been provided by WorkCover to date, in particular, the provision of supporting material to assist stakeholders in providing meaningful feedback.

Use of Regulations

- CME has concerns regarding the potential unintended consequences of the proposal to adopt areas of the draft Bill to regulation by enshrining a legislative environment designed for emergencies like COVID-19, not long-term regulation. While CME understands the need for the draft Bill to remain modernised, it has specific concerns with some areas, as provided below.
- CME does not support the intention for presumptive diseases to be set out in regulations and recommends that it remain as part of the draft Bill, as presented in the current Act.
- CME does not support the provision for a prescribed class of persons, other than medical practitioners, to issue a certificate of capacity. Instead, CME recommends that it remain as part of the draft Bill, as presented in the current Act.

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[1] Government of Western Australia, *2020 Economic indicators resources data*, Safety Regulation System, Department of Mines, Industry Regulation and Safety, 1 April 2021.

[2] Government of Western Australia, *Latest statistics release*, Department of Mines, Industry Regulation and Safety, 1 April 2021.

[3] TBC

[4] Cassells, R. *et al*, *BCEC Quarterly economic commentary: November 2020*, Bankwest Curtin Economics Centre, 26 November 2020, p. 2.

- CME supports the updated definition of 'worker' based on an 'employee' for Pay-As-You-Go (PAYG) withholding under Commonwealth taxation law. CME considers the updated definition appropriately addresses one area lacking clarity under the current Act.
- CME is concerned with the ability for regulations to extend the definition of worker and bring other work arrangements under the Act by prescribing classes of worker and employer where no PAYG provision applies. CME recommends that the definition of a worker remains as part of the draft Bill, with updates to the definition to go through legislative amendment if required.
- CME does not support the provision for compulsory testing and monitoring for hearing loss in workers to be set out in regulations, as determined by workplaces.

Administrative / Financial Burden:

- CME does not support the proposed change in the Step-Down period from 13 to 26 weeks and considers it could have a negative impact on return to work rates. CME considers the current 13-week period acts as a driver for all parties to ensure early intervention is provided to injured workers and recommends that the current Step-Down period of 13-weeks continues.
- CME does not support the increase medical and health expenses compensation cap to 60% of the general maximum amount, and recommends that it remain at 30%.
- CME recommends the removal of miscellaneous expenses in the draft Bill, notably first aid and emergency transportation costs. As the draft Bill provides that these expenses do not count towards a capped entitlement, there will be inequitably large cost implications to the resources sector where medical evacuation is a typical and extremely costly response.
- CME is concerned that clause 20 will present unintended consequences by disincentivising reporting and present additional onus to employers. CME recommends that further clarity is provided on what level of injury will require an employer to notify an employee of the right to claim compensation.
- CME does not support the draft Bill providing for a claim being taken as accepted if an insurer has not provided a liability decision notice by the deemed liability acceptance day. CME is concerned that this will lead to the unintended consequence of insurers denying liability of claims prior to the deemed liability acceptance day.

Reasonable Administrative Action

- CME supports the draft Bill excluding psychological or psychiatric disorders experienced by a worker as an injury from employment if it results from reasonable administrative action.

Medical Examinations

- CME does not support the prohibition of employer attendance in the medical examination of workers, due to the lack of flexibility it provides. CME recommends the clause be amended to:
    - allow workers to provide consent for situations where they preference the employer's presence in their medical examinations
    - provide clarity on employer's ability to attend a briefing with the medical practitioner and injured employee immediately after the medical examination.

Pre-Employment Disclosure

- CME recommends that clause 505 is redrafted to provide clarity on the sharing of information on worker's existing abilities and injuries. CME considers information on a worker's existing work restriction requirements is required to determine whether a new employee is able to undertake and sustain a role safely and effectively.

Context

Ensuring the health and safety of people working in the resources sector is the number one priority for CME and our member companies. The WA resources sector is recognised as a world leader in health and safety management. Companies strive to achieve their "zero harm" ambition every single day, which drives the sector's continuous improvement approach to health and safety. This approach has seen significant improvements in safety incidents over time. While the focus of industry should continue to be on preventing workplace injuries, it is crucial that a fair and efficient workers compensation regime exists.

The current *Workers' Compensation and Injury Management Act 1981* (the Act) provides employers and workers with the framework for every aspect of the workers compensation and injury management scheme in WA. While the scheme is performing well in WA, it has long been recognised by the regulator and industry as a complex and heavy piece of legislation. Some provisions in the Act are over 100 years old, and when combined with the 1981 amendments in the Act have created a confusing and disjointed environment.

From the outset, CME has been engaged in the modernisation process and broadly supportive of the proposed approach. The current task of modernising the Act represents the second stage of a legislative review process, which commenced in 2009. During the first stage review in 2010/11, CME was part of the stakeholder reference group consulted in the development of the *Workers' Compensation and Injury Management Amendment Bill 2011*. This level of engagement facilitated industry support for proposed amendments to restructure and simplify the scheme's dispute resolution processes and encourage timely closure of matters.

CME appreciates the opportunity to provide comment on the *Workers Compensation and Injury Management Bill 2021* (the draft Bill) as part of WorkCover WA's current public consultation. CME has previously been engaged in the review of the Act and provided feedback to the review Discussion Paper released by WorkCover WA (WorkCover) in October 2013. CME provided further comment to the *Review of the Workers' Compensation and Injury Management Act 1981: Final Report* (the Report) released in June 2014. The report contained over 170 recommendations for inclusion in the new workers' compensation statute. During this process CME provided support for the proposal in the report that the Act be repealed and replaced with a new statute which restructures the Act and is rafted with the objective of introducing plain language and contemporary drafting conventions.

The majority of the recommendations in the Report were supported by industry, and CME is pleased to see that these recommendations have led to the amendments in the draft Bill. These amendments both restructure and simplify the workers compensation processes, including dispute resolution, and encourage a timely closure of matters while promoting a successful return to work for workers.

While CME is pleased to see many of the recommendations and issues raised in our previous submissions to WorkCover in 2015 addressed in the draft Bill, there are three main areas which are of significant concern to industry. These are outlined in detail in the following sections of this submission and include the draft Bill's use of regulations, increased administrative burden, and financial implications associated with the proposed amendments. In addition to these areas, in the lead up to the 2021 Western Australian election, the McGowan Government provided additional election commitments for inclusion in the draft Bill:

- Step Down Period: Increasing the point in which income compensation payments step down from 13 to 26 weeks.
- Medical and Health Expenses: Increasing the cap on medical and health expenses compensation from 30% to 60% of the general maximum amount.
- Medical Examinations: A prohibition on employers attending medical appointments of injured workers.

These introduced changes differ from the recommendations provided in the Report and will be discussed in further detail in the below submission.

CME supports the principle of modernisation of the Act, provided it does not include unnecessary prescription, and welcomes the opportunity to provide feedback to the draft Bill. CME members are generally supportive of the draft Bill's content, with specific recommendations for improvement provided in the below submission.

The draft Bill will be supported by regulations (the Regulations) where much of the detail to support application of the Act will sit. The regulations that will support the Act are yet to be developed. As a result, CME considers it important detailed consultation occurs on the regulations prior to the Act being finalised. This will allow stakeholders to comment in a more fulsome manner on the reform package.

Given the accompanying regulations have not been developed as part of this consultation period, CME recommends that consultation on the draft Regulations occur prior to the finalisation of the Act. CME's full support of the draft Bill is contingent on CME review the detail of the accompanying regulations.

1. Consultation

The consultation process run by WorkCover on the draft Bill to date has been comprehensive, including:

- Briefing Sessions: In-person and online briefing sessions hosted by WorkCover. Where CME provided feedback that there was significant demand for these sessions, WorkCover provided additional briefings to ensure stakeholders had the opportunity to attend.
- Information Sheets: WorkCover developed 58 information sheets detailing key issues and changes to provisions in the draft Bill. Each information sheet included responses to anticipated questions about these changes.
- Guide to the draft Bill: A comprehensive overview of the draft Bill.
- Comparison Documents: Documents that provide comparison of the draft Bill with the Act by key provisions, and by section number.
- Stakeholder Briefings: WorkCover met with CME and member representatives in their office to discuss initial feedback and industry concerns.

Industry has found this process and the level of engagement from the regulator very positive. CME continues to encourage WorkCover to closely consult with industry to maximise opportunities to modernise the Act and supporting regulations and commends WorkCover for their efforts to make this a transparent consultation process for stakeholders.

CME welcomes the transparent consultation process that has been provided by WorkCover to date, in particular, the provision of supporting material to assist stakeholders in providing meaningful feedback.

2. Use of regulations

The draft Bill provides for the use of regulations to manage some areas of workers compensation and injury management regulation previously considered within the level of the Act, for example prescribed diseases and the broadening of the definition of a 'worker'. This is proposed to allow government to more nimbly respond to unforeseen issues. A recent example of where this would have applied is the COVID-19 pandemic response. Under the Act, the *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020* (the COVID-19 Response Act) and supporting amendment regulations commenced on 12 October 2020. Recognising the heightened risk presented to healthcare workers, the COVID-19 Response Act implemented new presumptive workers' compensation laws that benefit health care workers who contract COVID-19. While CME recognises the intent in providing greater flexibility to areas of the regulatory package that may be subject to change over time, we consider that using the COVID-19 response as a precedence to the development of the future regime as misguided. COVID-19 presented unprecedented health and wellbeing impacts across Australian society (and indeed the world). While COVID-19 has led to global impacts, the requirement for the world to rapidly respond to the pandemic should not be used to set a standard for legislation. Decisions made by leaders during the early-pandemic response were at times reactive and did not consider ongoing research or long-term implications, as, they were not available or known. CME cautions WorkCover in its consideration of applying this approach to broadly to workers compensation laws (Act and regulations).

There are a large number of clauses that allow for regulations to deem supporting details, dates, or exceptions. This can provide the regime with the ability to adapt regulations to suit changing technology and the current worker environment, however, CME considers the large number of clauses that are linked to regulation creates the risk of an unnecessarily prescriptive workers compensation regime. Additionally, industry notes that a key reason for updating the regime was to create a less confusing and disjointed environment and does not consider this split approach to legislation as an easier method for the user to understand the regime. As the regulations will not be drafted until the draft Bill has passed, CME in unable to comment on the significance or extent of all proposed clauses that allow for prescription by regulations.

CME has concerns regarding the potential unintended consequences of the proposal to adopt areas of the draft Bill to regulation by enshrining a legislative environment designed for emergencies like COVID-19, not long-term regulation. While CME understands the need for the draft Bill to remain modernised, it has specific concerns with some areas, as provided below.

2.1 Prescribed diseases

An example of where moving a section of the Act to regulations can create unforeseen complications is with the draft Bill's approach to prescribed disease. Clause 10 provides that the regulations specify a prescribed disease and associated prescribed employment for that disease. If a worker suffers an injury by a prescribed disease and is working in a prescribed employment for the disease, the injury is taken to be an injury from employment unless the employer proves otherwise. The effect of a prescribed disease list is to reverse the onus of proof and simplifies relevant claims on the assumption that there is a high likelihood that the disease has arisen as a result of work-related exposures. Industry acknowledges the importance of a list of prescribed diseases, and notes that the process supports workers who have experienced a presumptive work-related injury in a specified industry, simplifying relevant claims.

The draft Bill's use of regulations in this way differs greatly from the Act, where "specified industrial diseases" are provided within the Act under Schedule 3. Through this approach, any decisions on amendments to prescribed disease/s are required to be subject to parliamentary scrutiny, necessitating discussion and appropriate consideration through debate as to if the disease meets the criteria for inclusion. In moving the list of prescribed diseases to regulations, the draft Bill significantly reduces the governance and oversight that was previously required. Through regulations, the relevant Minister may add of remove industrial diseases to the prescribed diseases list at their own discretion.

CME notes that the information sheet provided by WorkCover informs the recommended list of diseases and corresponding occupations in the *Deemed Diseases in Australia* report (the Deemed Diseases Report) by Safe Work Australia (SWA) will be considered in the development of the regulations. The Deemed Diseases Report was released in August 2015 and is currently being reviewed by SWA in 2021 where it may be updated. CME questions if there is a requirement for the regime to rapidly respond and update a section where it will be basing its updates from a report which is updated by SWA every five years. As the clause 540 of the draft Bill provides for a mandatory five yearly review of the Act, industry considers that it would be more suitable for presumptive diseases to remain as part of the draft Bill, allowing for a continuation of the appropriate level of governance to be applied to the inclusion of prescribed diseases to the regime.

CME does not support the intention for presumptive diseases to be set out in regulations and recommends that it remain as part of the draft Bill, as presented in the current Act.

2.2 Certificate of Capacity

CME does not support the draft Bill providing for the regulations to permit health professionals, other than medical practitioners, to issue a certificate of capacity. While it is recognised that this could in some instances reduce costs and claim duration by allowing on-site medical staff to manage treatment and issue certificates, the provision also poses a risk to employer oversight of the process. Industry notes that health professionals can include occupational nurses, physiotherapists, and chiropractors, as examples.

Medical certificates are the fundamental evidence a worker needs to lodge a claim within the scheme. CME considers any changes must ensure the integrity of the scheme is maintained and recognises the critical role played by medical practitioners with the appropriate qualifications in professional monitoring, service capability, and referral capacity to accurately diagnose and treat injuries and illnesses within the scheme.

WorkCover has clarified through consultation that the events where the regulations would provide for another health professional to issue a certificate of capacity would be limited, with the intent to support those with minor claims or in remote areas. CME acknowledges that other health professionals play a valuable role in the treatment of workers, however, unlike medical practitioners, they do not have the necessary training for whole of injury treatment. Industry is supportive of providing flexibility, particularly to those in remote locations, to have a temporary certificate of capacity issued by a nurse practitioner, however, this should be provided for in the draft Bill, not via regulation. As previously stated, by including this flexibility in the regulations, it leaves the opportunity certificates of capacity to be issued by a broad range of health professionals over a variety of circumstances.

CME does not support the provision for a prescribed class of persons, other than medical practitioners, to issue a certificate of capacity CME recommends that it remain as part of the draft Bill, as presented in the current Act.

2.3 Definition of worker

CME supports the intent of the amendments to the definition of worker in the draft Bill, however notes that the definition may be broadened through regulations. The definition of worker has long created difficulties due to

the lack of clarity and difficulty in distinguishing between workers and independent contractors. Industry considers a clear definition of worker to be a fundamental threshold requirement for those seeking access to entitlements and for employers in ensuring they have the appropriate level of insurance.

Industry had previously recommended that WorkCover consider aligning the definition of 'worker' with the definition of an 'employee' for Pay-As-You-Go (PAYG) withholding under the *Tax Administration Act 1953*. CME is pleased to see this amendment has been applied in clause 12 of the draft Bill and considers this to be a sensible update which reduces the complexity in the current definition of 'worker' in the Act.

CME supports the updated definition of 'worker' based on an 'employee' for Pay-As-You-Go (PAYG) withholding under Commonwealth taxation law. CME considers the updated definition appropriately addresses the lack of clarity in the Act.

Any change to the definition of 'worker' will significantly impact employers and contractors and must be carefully considered to ensure it will improve the ability of employers, insurers and contractors to identify a 'worker' accurately. While industry is supportive of the updated PAYG definition of a 'worker', clause 13 provides that the regulations may provide that an individual who might not be considered a worker under clause 12, is a worker for the purposes of the draft Bill. This introduces flexibility for the regulations to include or exclude specific work arrangements and extend the definition of 'worker', meaning that industry is unable to comment on the full impact of this change at this time.

The WorkCover developed information sheets note that the legal status of on-demand workers is still uncertain, and as such the flexibility provided in the regulations allows for on-demand workers and other classes to be included in the definition of 'worker' if considered appropriate by WorkCover. While WorkCover has communicated to industry that it is not their intent to create 'legislation by stealth', verbal commitment does not allay concern from industry on the ability for the definition of a 'worker' to be further extended. The definition of a 'worker' is a key component to the operation of the draft Bill, and by extending this definition through regulation, WorkCover may fundamentally alter the scope and application of the regime. As such, CME considers that the definition of a 'worker' must only be updated through legislative amendment if required, and not through regulation. This allows for a highly level of scrutiny and debate to the amendment, instead of leaving it at the discretion of the relevant Minister.

CME is concerned with the ability for regulations to extend the definition of worker and bring other work arrangements under the Act by prescribing classes of worker and employer where no PAYG provision applies. CME recommends that the definition of a worker remains as part of the draft Bill, with updates to the definition to go through legislative amendment if required.

2.4 Audiometric Testing

Through the earlier consultation provided by WorkCover through the Report, CME has expressed concern with the proposal to empower WorkCover to determine which workplaces must undertake audiometric testing. This proposal risks creating unnecessary duplication between WorkCover and the Department of Mines, Industry Regulation and Safety (DMIRS) and is inconsistent with the preferred risk-based approach to safety and health management. While it is understood that the requirement to undertake baseline audiometric testing from prescribed workplaces is currently stimulated in the Act, industry is also required to manage risks associated with noise under resource safety legislation, including specific requirements under the *Mines Safety and Inspection Regulations 1995* (MSIR).

CME notes that WA is in the process of workplace health and safety reform and will be moving to the *Work Health and Safety Act 202*0 in early 2022, however, this will be supported by industry specific regulations which are expected to replicate the provisions in the MSIR. Under the new WHS (mines) regulations, it is expected audiometric testing will be required every two years. The current legislative reform process should consider removing duplication and streamlining regulation wherever possible.

CME does not support the provision for compulsory testing and monitoring for hearing loss in workers to be set out in regulations, as determined by workplaces.

3. Administrative / Financial Burden:

CME has previously advocated for a removal of unnecessary administrative burdens through the first stage review of the workers compensation regime. In order for the workers compensation scheme to effectively operate, claims must be appropriately investigated and managed in a timely manner. However, it must be considered that there may be a variety of reasons as to why a claim is pending, such as difficulties in finding a medical appointment within a set timeframe or delays in information being provided to insurers. These

delays can create administrative difficulties in addressing a worker's compensation claim, and may also introduce financial burden to the insurer or self-insurer.

The below section of the submission discusses how introduced amendments in the draft Bill may inadvertently place an administrative burden on the employer and insurer to meet specific deadlines, adding further complexity to the workers compensation regime. For example, the draft Bill proposed that an insurer or self-insurer who fails to issue a liability decision notice within 90 days is taken to have accepted the employer is liable to pay compensation. This fails to consider complex claims that often require over 90 days for the appropriate information to be collated, and a liability decision to be determined; nor does it consider the delays in received medical records. The below section will also address the financial implications associated with the draft Bill, including the doubling of the income compensation step-down period from 13 to 26 weeks.

3.1 Step-Down Period

The draft Bill increases the income compensation payments step-down period from 13 to 26 weeks. As stated earlier in this submission, this increase was a late election promise by the Labour government for inclusion in the draft Bill. As per the current workers compensation regime, income compensation payments are calculated based on pre-injury earnings over a 12-month period. The step-down period is where the worker's pre-injury weekly rate of income 'steps down' to 85%. Under the draft Bill this this period has been extended beyond 13 weeks. Industry is supportive of the 13-week step-down period, agreeing with the Report that it is a valuable component of the workers compensation regime:

> *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.*

Despite this providing a significant financial impact to the current regime, there has been no information provided by WorkCover as to why this change has been proposed. CME notes that the Report provided support for the step-down period to remain as 13 weeks, recommending that that after 13 weeks of incapacity, payments will be reduced to 85% of pre-injury earnings (with considerations to the base award rate of pay for award workers). Industry is uncertain why this change has been proposed, as there has been no indication to how this can improve the current return to work rate.

Through consultation information provided by WorkCover, preliminary costings are estimated as a 1.63% increase in the average premium rate as a result of the increase step-down period. However, through informal consultation it has been understood that the financial implications of this change are dependent on behavioural factors that cannot be accurately projected. Industry considers the current 13-week period as a driver for all parties involved to ensure early intervention is provided to injured workers, with the workers' recoveries progressing along best practice evidence-based medicine timeframes. For example, feedback from members indicate that the majority of musculoskeletal injuries that receive reasonable treatment and graduated return to work have recovered to a point of being capable of returning to full duties within the existing 13-week period. Additionally, payments reducing following 13 weeks would act as a contributing financial incentive to promote recovery of an employee's injury. CME considers that the behavioural factors associated with an increased step-down period will have a negative impact on the current return to work rate in WA (82%) while also imposing additional claims cost to insurers and self-insurers.

CME does not support the proposed change in the Step-Down period from 13 to 26 weeks and considers it could have a negative impact on return to work rates. CME considers the current 13-week period acts as a driver for all parties to ensure early intervention is provided to injured workers and recommends that the current Step-Down period of 13-weeks continues.

3.2 Medical and Health Expenses Cap

Another election commitment which has been included in the draft Bill is the increase of the cap on medical and health expenses compensation from 30% to 60% of the general maximum (prescribed) amount. Similar to the proposed increase of the step-down period, justification for this change has not been provided. The Report recommendations did not include any reference to increasing the medical and health expenses compensation, nor was it included as part of the Review Discussion Paper. As such, there has been no consultation or discussion prior to the election commitment being made. Supporting information provided by WorkCover has provided preliminary costing estimates of a 0.63% to 1.4% increase in the average premium rate as a result of this change.

CME does not believe that an increased cap on medical and health compensation will result in improved health outcomes for workers. It is likely, however, that this change will may increase the risk of health professionals providing excessive medical services due to the direct monetary incentive. Through the *Review of Medical and Associated Costs* report on the WA workers compensation system, there was evidence that excessive services such as medical, pharmaceutical, and physiotherapy were provided to workers with compensation claims, which were "of questionable medical benefit to the worker". The doubling of the current medical and health expenses compensation cap will likely exacerbate the issue, leading to greater financial implications that those provided in the preliminary costing estimates while providing little benefit to the worker.

CME does not support the increase medical and health expenses compensation cap to 60% of the general maximum amount and recommends that it remain at 30%.

3.3 Miscellaneous Expenses

The draft Bill also introduces a new category of 'miscellaneous expenses'. These miscellaneous expenses are not to be included as part of the medical and health expenses compensation and are instead considered an additional cost. A notable inclusion to the miscellaneous expenses which is of concern to industry is first aid and emergency transport, under clause 86. The first aid and emergency transportation is a considerable departure from the Act, requiring that any costs incurred for ambulance or air transportation services would not be included in the worker's medical and health expenses general limit.

Due to the remote nature of the resources sector, medical evacuation is a common occurrence. It is often quick to be used to be on the 'safe side' when managing health and safety on remote mining operations. In removing the costs incurred for ambulance or air transportation services from a workers medical and health expenses general limit, there would be significant financial implications. This may have the unintended consequence of disincentivising use of such services, as we see in the general public. CME considers this as an unreasonable additional cost that has the potential to discourage use of medical evacuations for and as therefore, does not support the inclusion of miscellaneous expenses in the draft Bill.

CME recommends the removal of miscellaneous expenses in the draft Bill, notably first aid and emergency transportation costs. As the draft Bill provides that these expenses do not count towards a capped entitlement, there will be large cost implications to the resources sector where medical evacuation is a typical and extremely costly response.

3.4 Notice of Injury

The draft Bill removes the requirement for workers to provide notice of injury in addition to making a claim for compensation, and requires employers to inform workers of the right to claim compensation. Under clause 20, an employer must inform the worker in the approved form that they may have a right to compensation for an injury within 14 days of becoming aware that a worker may have suffered an injury from employment. Industry notes that there is little clarification within the draft Bill about what constitutes and injury and what type of notification is considered an "approved form". The resources sector has a positive reporting culture, allowing low-level injuries to be reported and managed. This positive reporting culture allows the employer to additional risks that may be presented by everyday activities, allowing for preventative action to be taken. For example, a worker tripping and scraping their knee could indicate a potential trip hazard in the workplace.

If the amendment requires written notification about the right for a worker to claim compensation, industry considers this to be labour intensive and potentially unnecessary given the nature of a number of reported injuries on site. For example, minor cuts or burns are valuable incident reports as they allow for the employer to respond to potential safety risks in the workplace, but they do not necessitate a workers compensation claim. This additional administrative burden is unlikely to provide meaningful impact on a worker's understanding of their ability to claim compensation for the injury and may instead create confusion amongst workers.

CME understands that the intent of this clause is to raise awareness of the workers' compensation regime, however, considers it to be well understood amongst employees and employers. There may be groups withing the workforce that do not fully understand the regime (for example, new migrants), however, industry does not consider it to be the role of employers to provide education campaigns or raise awareness. Industry would be supportive of WorkCover providing targeted awareness raising campaigns for identified groups who may not wholly understand the workers compensation process to ensure that the regime is communicated in a streamlined consistent manner.

CME is concerned that clause 20 will present unintended consequences by disincentivising reporting and present additional onus to employers. CME recommends that further clarity is provided on what level of injury will require an employer to notify an employee of the right to claim compensation.

3.5 Responding to Claims

As previously stated in this submission, an important component of an effective workers compensation regime is the timely response and management of claims. The draft Bill includes the requirement for an insurer or self-insurer to respond to a worker's claim for compensation within 14 days of receiving the worker's claim. If no response has been received within the 14-day period, the worker's claim will be deemed as accepted, requiring the employer to compensate the worker and payments of compensation to be made (including income compensation for any incapacity).

In the event where a deferred decision notice is provided to the worker, the insurer or self-insurer must commence provisional payments to the worker if a decision on liability is not made on the day prescribed by the regulations as the 'provisional payment day'. The 'provisional payment day' introduces prescribed provisional payments as part of the draft Bill and provides an obligation on insurers and self-insurers to make a provisional payment is a liability decision is not given within the permitted time. CME notes that this 'permitted time' is the 'provisional payments day' and will be set out in regulations. While the information sheets provided by WorkCover as part of the consultation process have indicated that the provisional payment day will be 28 days from when the claim was given to the insurer or self-insurer, this cannot be confirmed and can again be subject to change at the discretion of the relevant Minister.

The introduction of provisional payments is of considerable concern to industry. Culturally, there is currently an arbitrarily held view that the initiation of payments indicates acceptance of claim liability. Financially, it is expected that the introduced obligation will present significant cost impacts, as it appears that costs cannot be recovered if further investigation results in the claim being denied.

Additionally, the decision on liability must be made by the 'deemed liability acceptance day'. If a decision on liability has not been provided within this period, the insurer or self-insurer will be deemed to have accepted that the employer is liable to compensate the worker and payments of compensation must be made. Similar to the approach taken with the provisional payment day, the deemed liability acceptance day is to be provided through the regulations. WorkCover has indicated that the deemed liability of acceptance day will likely 90 days, however, stakeholders will not have certainty on this until the regulations are released.

CME considers the introduction of both the provisional payments day and deemed liability acceptance day will likely result in a significant increase of denied workers compensation claims. Insurers are often unable to assess a claim within a set time period due to difficulties in receiving medical information. For example, psychiatrist waiting lists in Australia have grown to four to six months through the COVID-19 pandemic. In events where a worker has placed a workers compensation claim for psychological injury, it is unlikely that the insurer will receive all appropriate information by the deemed liability acceptance day. As such, for claims where the insurer is provided with insufficient information to determine acceptance within the prescribed dates, there is a high likelihood that the insurer will deny the claim prior to the provisional payment date. This will require the worker to provide the required information through the dispute review process, putting increased pressure on the conciliation service to manage disputed claims. Instead of prescribing set timeframes for the assessment of claims, it is important that WorkCover addresses the claims process, ensuring that insurers are provided with all of the information required for assessment.

CME does not support the draft Bill providing for a claim being taken as accepted if an insurer has not provided a liability decision notice by the deemed liability acceptance day. CME is concerned that this will lead to the unintended consequence of insurers denying liability of claims prior to the deemed liability acceptance day.

4. Reasonable administrative action

Part of being an employer is to manage performance and conduct of workers at work. In some cases, employers may be required to take administrative action if an employee is not fulfilling the requirements of their role.

The Act excludes stress-related claims which result from such administrative actions undertaken by a worker's employer. Administrative action may include disciplinary action, transferral, or lack of promotion, as examples. This means that if employer management of workplace behaviours or performance management has a negative impact on the psychologically health of a worker, they may be able to claim compensation for that injury.

The draft Bill provides for the exclusion of any psychological or psychiatric disorder arising out of administrative action. Appropriately, this exclusion only applies to reasonable administrative action and will not extend to psychological claims caused by an employer's behaviour of conduct (for example, bullying). CME considers this to be a sensible refinement from the prior expansive exclusion, allowing for employers to appropriately manage workplace behaviours and employee performance through reasonable administrative action.

CME supports the draft Bill excluding psychological or psychiatric disorders experienced by a worker as an injury from employment if it results from reasonable administrative action.

5. Medical examinations

The draft Bill introduces a provision which prohibits an employer from being present at medical examinations, which is currently permitted under the Act. As mentioned earlier in the submission, CME acknowledges the intent of maintaining the privacy and dignity of a worker during a physical medical examination; and also notes this inclusion was an election commitment. Industry has expressed concern with the introduced provision, as workers often request that the employer provide support during their medical appointment. For example, following an incident, a worker may not be able to clearly articulate their role and work responsibilities to the medical physician. This can lead to the worker being approved for full work duties, and potentially further injuring themselves. With an employer present, a clear description of the worker's role and duties can be provided, and medical advice can be shared with the employer for the purposes of developing an appropriate return to work plan. Additionally, in some situations the worker has requested that the employer is present during their treatment. For example, if the worker requires emotional support and has a supportive relationship with their employer, they may request that they be present.

Through consultation between CME and WorkCover, it has been understood that the provision is to be applied to the physical component of a medical examination and is not intended to prohibit the employer from attending a worker's medical appointment for the purposes of discussions regarding return to work, work duties, and current capacity. While industry is supportive of the intent that has been communicated by WorkCover, it does not consider this intent to be clear in the current drafting. As such, clause 171 should be redrafted to provide clarity that it is only to be applied to the initial physical medical examination and may be immediately followed by a briefing where the employer may be present.

CME does not support the prohibition of employer attendance in the medical examination of workers, due to the lack of flexibility it provides. CME recommends the clause be amended to:

- allow workers to provide consent for situations where they preference the employer's presence in their medical examinations
- provide clarity on employer's ability to attend a briefing with the medical practitioner and injured employee immediately after the medical examination.

6. Pre-employment disclosure

The draft 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 may not be required to disclose information about a compensation claim for the purpose of selection for employment. CME agrees with the intent of this clause, however, considers that the drafting should be improved to provide clarity in the sharing of information on a worker's existing abilities and injuries. While industry does not require information of workers compensation history, disclosure of current abilities and injuries may be required in pre-employment screening to determine whether a new employee is able to undertake and sustain the job role in a safe and effective way.

DMIRS asks that employers conduct appropriate medical assessments that are role specific – industry considers previous history as a relevant component of that process. Employers are liable for injuries that are exacerbations or accelerations of underlying conditions. As such, employers need to be able to lawfully ascertain this information to understand the risk profile of bringing a prospective employee into their business. Not having this information could lead to increased risk to the prospective employee by placing them in a role that they are not safely able to undertake. As an example, during pre-employment, employers may request information regarding existing injuries, the level and duration of recovery (including evidence of sustained work and/or functional capacity following a work injury), and the details of any work restriction requirements (such as medically certified permanent restrictions). Without this information, the worker's condition may be at significantly increased risk of aggravation, meaning the employer is unable to fully comply with their duty of care requirements.

CME recommends that clause 505 is redrafted to provide clarity on the sharing of information on worker's existing abilities and injuries. CME considers information on a worker's existing work restriction requirements is required to determine whether a new employee is able to undertake and sustain a role safely and effectively.

Conclusion

CME welcomes WorkCover's open consultation and encourages further consultation with industry, to maximise opportunities to improve the clarity and operation of the workers compensation regime, while minimising unintended impacts, unnecessary cost, or administrative burden.

As mentioned, the draft Bill's use of regulations can provide flexibility to the workers compensation regime but will remove the governance and oversight to clauses that are current provided in the regime. Introduced clauses that provide further detail surrounding deadlines and financial payments may require further consultation, as they can create a more complex regime, going against the intent of modernising the Act. CME would welcome the opportunity to discuss the issues identified in our submission in more detail and to provide support during the development of the supporting regulations, in order to reach the best possible solution for workers, industry and government.

If you have any further queries regarding the above matters, please contact Laila Nowell, Policy Adviser – Safety, Health & Wellbeing, on 0419 712 053 or L.Nowell@cmewa.com.

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