

Australian Industry Group

Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015

Submission to
Senate Education and Employment
Legislation Committee Inquiry

1 MAY 2015

The logo for the Australian Industry Group, featuring the letters 'Ai' in a large, stylized font above the word 'GROUP' in a smaller, bold, sans-serif font.

Ai
GROUP

SAFETY, REHABILITATION AND COMPENSATION AMENDMENT (IMPROVING THE COMCARE SCHEME) BILL 2015

SENATE EDUCATION AND EMPLOYMENT COMMITTEE INQUIRY

INTRODUCTION

The Australian Industry Group (Ai Group) is Australia's peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

We intrinsically appreciate the challenges facing industry and Ai Group remains at the cutting edge of policy debate and legislative change, providing vocal advocacy for changes to workplace laws that will allow employers to run their businesses more effectively. Our deep experience of industrial relations and workplace law positions Ai Group as a leading advocate on behalf of enterprises large and small across Australia.

We employ more than 300 staff who passionately seek to keep members abreast of best practice and compliance. Our workplace lawyers work hard to protect the interests of Australian businesses every day, minimising the risks and costs associated with employing people. And when it comes to safety, we know the importance of an industry-led approach – not only are we a key player in the regulatory debate, we also offer practical support to help companies improve their safety performance.

Ai Group welcomes the opportunity to make a submission to the Senate Committee Inquiry in relation to the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (the Bill), which will amend the Safety, Rehabilitation and Compensation Act 1988 (the SRC Act).

This Bill is of particular interest to the broad business community in the light of other recent developments, including the introduction of the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (the 2014 Bill). If passed, the 2014 Bill will remove the “competition test” that currently limits the eligibility of employers to apply to opt into Comcare as a self-insurer.

A number of our members who have workers’ compensation obligations across more than one jurisdiction are watching progress of the 2014 Bill; they are considering the advantages and disadvantages of taking up the opportunity to apply to join the Comcare scheme as a self-insurer, as an alternative to current jurisdictional based options.

We are also aware of the current policy debate which is considering whether the Comcare scheme should be opened up further to allow “national” employers to enter the scheme as an insured employer, rather than only as a self-insurer. This would result in the scheme having a much broader intersection with our membership.

Ai GROUP SUBMISSION

In this submission we have focused on six key areas addressed in the Bill, encompassing:

- Schedule 1 – Eligibility requirements
- Schedule 2 – Rehabilitation and return to work
- Schedule 4 – Provisional medical expense payments
- Schedule 8 – Taking and accruing leave
- Schedule 9 – Weekly benefits
- Schedule 15 – Sanctions

We do not have any specific comments on the amendments proposed in the other Schedules of the Bill.

SCHEDULE 1: ELIGIBILITY REQUIREMENTS

It is noted that the amendments made by Schedule 1 to the Bill will only apply to injuries sustained after the commencement of this item, being the day after Royal Assent.

Psychological Injury Claims:

Exclusion related to reasonable management action

Amendments brought about by clauses 8 and 9 will provide greater clarity around the circumstances in which a psychological injury is excluded from eligibility for compensation.

Importantly, in addition to there being an exclusion if the injury resulted from “reasonable management action taken in a reasonable manner”, a further factor is specified: “the employee’s anticipation or expectation of reasonable management action being taken”.

The non-exclusive list of actions that are considered to be management action for the purpose of this exclusion has been expanded to encompass:

- an organisational or corporate restructure;
- a direction given for an operational purpose or purposes;
- anything done in connection with an action mentioned above.

Comment:

It is Ai Group’s understanding that there have been situations where it has been necessary to accept claims when an employee suffered a psychological injury in anticipation of reasonable management action taking place. It is totally inappropriate for a person to be able have a claim accepted simply because they lodged the claim before the employer commenced reasonable management action in a reasonable manner.

Ai Group supports these important amendments to the definition of psychological injury as it creates a fairer approach to the application of the legislation.

Designated Injuries

Clause 15 of the Bill will amend the definition of injury to include a concept of “designated injury” (through insertion of a new s.5C). Designated injuries include specified heart, brain and spinal injuries where the injury “consists of, is caused by, results from, or is associated with, a [specified] pre-existing ailment”.

Subsequent amendments to section 5A of the SRC Act will result in designated injuries only being compensable where employment with a scheme employer contributed, to a significant degree, to the designated injury or an aggravation of the designated injury. Further, inclusion of a new subsection 5A(3), identifies the matters that may be taken into account when determining whether employment contributed to a significant degree.

Comment:

It is Ai Group’s view that this is an important amendment. In the past, claims for heart attack and stroke injuries have been accepted solely on the basis that the specific event occurred at work. These amendments should ensure that employers are not required to make workers’ compensation payments for injuries which are not closely connected to work. Other jurisdictions have made similar amendments, particularly in relation to heart and brain injuries; this occurred in Victoria as long ago as 2003.

Definition of Disease

Section 5B of the SRC Act provides a definition of disease. Clauses 10 to 13 of the Bill provide more clarity around the matters to be considered when determining whether an ailment or aggravation was contributed to by employment to a significant degree.

Clause 16 inserts a new section 7A which will enable Comcare to establish, by legislative instrument, a Compensation standard related to specific ailments that sets out the minimum factors that must exist before it can be said that an employee is suffering from an ailment.

Clause 14 of the Bill creates a new subsection 5B(3) which requires that the matters in a Compensation Standard must be taken into account.

Comment:

It is Ai Group's view that these combined amendments will allow for a transparent assessment to be undertaken in relation to the very difficult scenarios that arise when there is a potential combination of work related and non-work related factors associated with an ailment or aggravation. Employers continually raise this issue across all schemes and it will only become more important as the ageing workforce continues to work into years where it would generally be expected that such ailments or aggravations would occur as part of the ageing process.

Eligibility Generally

Comment:

Ai Group welcomes the proposed amendments to the eligibility criteria established by Schedule 1. We believe they help to maintain an appropriate balance between the right of employees to receive fair and reasonable compensation and the maintenance of a viable scheme which enables employers to fund the claims that are work related, without also bearing the costs of claims that are unrelated to employment.

As with all legislation, especially that relating to workers' compensation, there will be a need to vigilantly monitor the application of the provisions by Comcare and self-insurers, to ensure the provisions are being implemented as intended. The decisions of tribunals and courts will also need to be monitored to identify if further intervention is required.

SCHEDULE 2: REHABILITATION AND RETURN TO WORK

The amendments proposed by Schedule 2 should streamline the approach to rehabilitation and return to work.

Comment:

Ai Group supports the focus on rehabilitation and return to work in Schedule 2. However, we note that the effectiveness of rehabilitation and return to work is also reliant on the scheme design as a whole, not just those provisions that relate directly to rehabilitation and return to work.

SCHEDULE 4: PROVISIONAL MEDICAL EXPENSE PAYMENTS

The amendments proposed in Schedule 4 would create a provisional entitlement to medical expenses of up to \$5,000 for an employee who believes, on reasonable grounds, that he or she has suffered a compensable injury.

Comment:

In jurisdictions that currently have provisional liability, the entitlement relates to both weekly compensation and medical expenses. Ai Group is cautious about this concept as there is scope, unless the scheme has specific protections, for employees to obtain multiple short periods of weekly compensation without claims ever being determined. This is of particular concern to employers when liability would generally be contested, i.e. psychological injury or aggravations of pre-existing injuries.

However, we believe that the granting of provisional liability for medical costs establishes a workable compromise that enables an employee to seek timely medical treatment which could enable them to stay at work, or return to work in a timely manner.

SCHEDULE 8: TAKING AND ACCRUING OF LEAVE

Section 130 of the Fair Work Act currently states:

- (1) An employee is not entitled to take or accrue any leave of absence (whether paid or unpaid) under this Part during a period (a **compensation period**) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a **compensation law**) of the Commonwealth, a State or a Territory that is about workers' compensation.
- (2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.
- (3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

The effect of section 130 of the Fair Work Act is that leave does not accrue, and a person cannot take leave, when they are on workers' compensation unless the specific workers' compensation laws permit such an entitlement.

Section 116 of the SRC Act currently allows for sick leave and recreation leave to accrue in relation to each of the first 45 weeks during which he or she is on post-determination compensation leave. Further, long service leave continues to accrue during the whole period of post-determination compensation leave.

Hence, the SRC Act is inconsistent with the general position under section 130 of the Fair Work Act, by specifically allowing a person to take and accrue leave whilst on workers' compensation. The SRC Act is also inconsistent with most of the state/territory workers' compensation statutes that do not deal with the accrual of leave.

Schedule 8 of the Bill inserts section 116(1A) which states "Subsection (a) has no effect to the extent to which it is inconsistent with section 130 of the Fair Work Act 2009.

The Explanatory Memorandum (EM) to the Bill states that “this amendment is consistent with proposed amendments to section 130 of the Fair Work Act.” Further it is stated that this section would commence on the day after Royal Assent or the commencement of item 5 of Schedule 1 to the Fair Work Amendment Act 2015, whichever is later.

Comment:

It is Ai Group’s view that the insertion of section 116(1A) creates unnecessary confusion. This will be exacerbated once the amendments to the Fair Work Act are in place, with employers and employees having to refer to two pieces of legislation in order to understand that leave is not to accrue, and cannot be taken. It would be much clearer if section 116 was repealed altogether, effective on the date of Royal Assent.

If it is not appropriate to do so before the amendments to the Fair Work Act are passed, clarity could be achieved inserting an effective date written in the same manner as is currently the case for the proposed introduction of clause 116(1A).

SCHEDULE 9: WEEKLY BENEFITS

Schedule 9 of the Bill introduces a range of changes associated with the payment of weekly benefits.

Average Weekly Earnings

The initial parts of Schedule 9 focus on what will be considered as part of average weekly earnings for the purpose of calculating weekly compensation.

Comment:

It is Ai Group’s view that these new provisions will align the legislation more closely with the broader range of industries to which the legislation now applies, and the industries that may apply to opt into the Comcare scheme as a self-insurer if the 2014 Bill is passed.

Calculation of Weeks for the purpose of compensation.

The current Act establishes that the amount payable for weekly compensation reduces from 100% to a lesser percentage (75% to 95% dependant on the hours worked) once 45 weeks of compensation has been paid. This reduction in payments is generally referred to as a “step down”.

In other jurisdictions, the accrual of weeks for the purpose of weekly compensation payments occurs as outlined below:

A week is counted if, in a week (generally Sunday to Saturday):

- A person is totally off work and in receipt of weekly compensation; or
- A person is at work for part-time hours and receives weekly compensation for the remainder of that week; or
- A person is at work for full-time hours but is entitled to compensation because their average weekly earnings was higher than their current earnings (e.g. the person’s compensation rate is taking into account overtime payments, but the worker is only working ordinary hours)

A week is not counted if the worker is not in receipt of weekly compensation, even if they continue to have some level of incapacity. This would generally occur when they are back at work on full time modified, or pre-injury, duties and earning equal to their pre-injury earnings.

Within the Comcare scheme, the SRC Act currently establishes a complex formula for calculating weeks in that 45 weeks accrues when the employee has received compensation payments equal to “45 times the employee’s normal weekly hours”. Effectively, this means that an employee who was back at work for 50% of a week would take 90 calendar weeks to accrue 45 weeks for the purpose of the step downs.

Clause 31 of the Bill will amend sections 19(2) and (3) of the SRC Act resulting in the accrual of weeks aligning with most other jurisdictions.

Comment:

Ai Group supports the new approach to accruing weeks as it:

- aligns the Comcare system with most other jurisdictions;
- ensures that there is a relatively easy approach to counting weeks; and
- provides an incentive, through more timely step-downs, for injured employees to return to full time duties.

SCHEDULE 15: SANCTIONS

Inserted by Schedule 15, new Division 5B of the SRC Act will establish provisions associated with a *Breach of obligation of mutuality* (Subdivision A) and associated sanctions (Subdivision B).

Clause 29L relates to: the failure to accept an offer of suitable employment; failure to engage, or to continue to engage, in suitable employment; or failure to seek suitable employment.

The remaining clauses (29M through to 29V) cover a range of other breaches:

- 29M Refusing or failing to undergo a medical examination
- 29N Being absent from work without a medical certificate etc.
- 29P Refusing or failing to follow medical treatment advice
- 29Q Refusing or failing to undergo an assessment for household services and attendant care services
- 29R Refusing or failing to fulfil responsibilities under a workplace rehabilitation plan
- 29S Refusing or failing to undergo a work readiness assessment
- 29T Refusing or failing to comply with a notice
- 29U Refusing or failing to comply with a requirement related to a common law claim against a third party
- 29V Failing or refusing to give a statutory declaration required by the Act

Subdivision B then establishes a complex set of provisions through the insertion of clauses 29W to 29ZD, which operate to impose an escalating set of sanctions that will result in reduction, suspension or cancellation of entitlements to compensation.

A detailed analysis, including direct comparison of wording between clauses 29W and 29X, identifies that:

- initial breaches associated with clause 29L will result in a reduction in weekly benefits by the amount that the worker could have earned in suitable employment;
- initial breaches associated with the other obligations will result in suspension of compensation; and
- a third breach of any obligation of mutuality will result in cancellation of payments.

In describing the different approach to sanctions, between those relating to clause 29L and the other breaches, the Explanatory Memorandum states, at paragraph 561:

“A breach of an obligation of mutuality covered by new section 29L related to suitable employment is **unable to be repaired by the employee** as it is contingent on an offer of employment being made by **a third party** that may be withdrawn by the employer if the offer is refused by the employee. In this case, an employee’s weekly incapacity payments will be reduced under the provisions of subsections 19(2), (2A), (2B) and (4) rather than suspended”.

Paragraph 561 is unclear as it refers to offers of suitable employment from a third party. As a *third party* would generally be seen as a party not directly involved in the situation, the EM could be read to mean that this provision relates to offers from a different employer, rather than those made by the liable employer.

This interpretation could also be supported by the existence of clause 29R which creates a sanction related to “refusing or failing to fulfil responsibilities under a workplace rehabilitation plan”. It is clear that this provision is designed to cover a broad range of situations, but it could be argued that it includes the expectation that the employee would accept an offer of suitable employment with the liable employer.

Comment:

Ai Group supports the policy intent of including specific obligations of mutuality and supporting them with an escalating series of sanctions.

We have no further comment to make on the application of sanctions associated with clauses 29M to 29V, other than the relationship between clauses 29L and 29R.

Clarity of sanction provisions

Ai Group is concerned that there is a lack of clarity about the scope of and application of sanctions related to clause 29, as outlined below.

The inclusion of the clause 29L sanctions within the general sanctions provisions makes it very difficult to follow and clearly interpret. Clarity would be greatly improved if the sanctions associated with clause 29L were separated out from clauses 29W and 29X, and written in a stand-alone clause.

Confusion about the scope of clause 29L

In attempting to understand the intended application of clause 29L, we referred to paragraph 561 of the EM. The reference to a third party created a level of confusion and, specifically, caused us to ask the question “is clause 29L intended to apply to all offers of suitable employment (including those by the liable employer), or only those made by alternative employers?”

If interpreted as applying only to third party offers (as indicated in the EM), it could be argued that a failure to participate in suitable employment with the current employer would be covered by clause 29R; this would then be seen as a breach that could be remedied by the employee and a different set of sanctions would apply.

It is essential that there is no uncertainty about the scope of clause 29L; this needs to be addressed through either amending the Bill or the EM and/or providing clear guidance.

Application of clause 29L sanctions

Ai Group is also concerned about the manner in which the clause 29L sanctions would be applied, particularly as they apply to both failing to accept or engage in specific suitable employment, and a more general provision related to failing to seek suitable employment. It is relatively easy to identify when a person fails to accept or engage in suitable employment; it is also relatively easy to identify the quantum reduction of benefits if a specific offer of suitable employment has been rejected or not complied with. However, it is not so clear in relation to a failure to seek suitable employment; it will need to be identified when breach occurs and what potential earnings have been forfeited?

Potential unintended consequence of 29L sanctions

A potential unintended consequence of the clause 29L sanctions may be a reduction in the incentive for employees to seek, or participate in, suitable employment in the future when the sanction is designed around a concept that an employee is unable to “repair” this type of breach (as indicated in the EM). This would particularly be the case if the notice to the employee included such words.

It will be essential that there is clear guidance for employees and employers about the importance of pursuing suitable employment options, even if sanctions have been applied under clause 29L. Such guidance should cover:

- Requirements on the liable employer to provide information within, or supporting, an offer of suitable employment, regarding the potential financial impact of not accepting the offer; and
- Information within the breach advice provided to the employee about how they can minimise the impact of the sanction, e.g. by actively seeking suitable employment and/or actively considering any future offers of suitable employment.