Australian Federation of Employers and Industries (AFEI)

Submission to the State Insurance Regulatory Authority of NSW (SIRA)

Workers Compensation Amendment Bill 2015—Schedule 4

10 December 2015

AFEI
Australian Federation of Employers & Industries

Australian Federation of Employers and Industries (AFEI)

Submission to the State Insurance Regulatory Authority of NSW (SIRA)

Workers Compensation Amendment Bill 2015—Schedule 4

Return to Work Assistance Discussion Paper

10 December 2015

---

1. AFEI has significant concerns with the fundamental character of the Schedule 4 Amendment of Workers Compensation Act 1987 (the **amendments**) which, given the legislative intent, are unlikely to be remedied by the operational and administrative matters raised for consultation as regulatory controls in SIRA's New return to work assistance—Discussion Paper.

2. In contrast to the provisions of section 53 Workplace Injury Management and Workers Compensation Act 1998, the amendment designates work assistance (as defined) to be compensation which the pre injury employer of the worker is liable to pay. The pre injury employer is liable to pay this compensation in addition to any other compensation (s 64B(4)), in contrast to the existing agency administered assistance programs which are funded by the scheme. These are a cost to the scheme and an indirect cost to all employers.

3. In calculating premiums, the Employers Claims Performance Measure (CPM) utilises three years' claims costs and three years' wages. At present (but always subject to change by the regulator) claims costs comprise selected paid amounts, not all paid amounts, and currently do not include estimates for future costs. Paid claims costs currently include weekly benefits, death benefits, permanent impairment lump sums, common law payments and commutations. Clearly work assistance payments are to be included in paid claims costs or they would not have been characterised as compensation payments. It will be entirely at the discretion of the regulator as to whether these costs are included for claims experience purposes.

4. The intention in designating this additional assistance to workers as compensation is to impose yet another punitive provision on those employers who are unable to continue to employ the injured worker: "Not offering an injured worker suitable employment may have an impact on the *cost of your workers compensation*

premium and a breach of your obligation to provide suitable employment may result in you receiving a financial penalty". [1]

5. This punitive element for the employer, consistent with other incentive/punitive features of scheme design intended to encourage return to work, ideally with the same employer, is at odds with having meaningful regulatory controls on the provision of work assistance payments. If the intention is to bump up claim costs for the pre injury employer, there will be little incentive to install cost restrictions, such as those currently intended to apply in agency administered assistance programs. Apparent employer reluctance to continue employment is to invite an additional penalty element in their premium and consequent adverse impact on their claims performance measure. By way of contrast, employers participating in the JobCover placement program do not have the new worker's wages included in their premium for two years.

6. We have repeatedly challenged those elements of scheme design which are intended to penalise employers for their claims performance. In no fault schemes, the most tenuous of connections between work and injury is accepted, yet this causal link is fundamental to the legitimacy of any scheme, as is the quality of claims management. We have long been concerned with a scheme which enables the near automatic acceptance of all incapacity or injury as work related, and penalises the employer through increased premiums as a consequence of inept claims management and costs, over which they have no control.

7. Claims cost are a function of acceptance rates, claims management and work capacity decisions. Our members have frequently raised issues about agent and treating doctor reluctance to have a worker return to work, even where suitable duties are available. Employment with a new employer in many instances could have been avoided by more concerted attempts to get the worker on to suitable duties earlier. Certainly closer attention by agents and medical practitioners to capacity, the work environment and available options in the workplace would assist. Even where the employer can provide suitable duties which accord with a work capacity decision, a worker may successfully challenge a work capacity assessment. This will no doubt be even more successful with the availability of legal advice within the scheme with cost increases to be further compounded by that amendment.[2]

---

1 http://www.workcover.nsw.gov.au/workers-compensation-claims/recovery-at-work/information-for-employers/suitable-employment

2 See AFEI Submission to the State Insurance Regulatory Authority of NSW (SIRA) Regulation of legal costs for work capacity decision reviews Discussion Paper 26 November 2015.

8. Further it is arguably good practice to allow for separation from the employer where continuing in pre injury employment does not promote (or may even impede) return to work.[3] Employers should not be penalised in these circumstances.

9. No data has been provided to indicate the extent, cost and success of current assistance programs and vocational retraining, nor on the extent of re employment of an injured worker with a new employer. No baseline assessment of the efficacy of existing measures has been made available. No information is provided as to the impact of incentive/punitive measures in this aspect of scheme design and their worth in a sustainable and fair scheme. While there is "money in the bank", funded by employers, the NSW Government simply redistributes this with largess. We have no information as to how well/poorly vocational assistance is performing or its likely adverse/beneficial impacts on the scheme.

10. Unions have long argued that the availability of retraining should be a core function of the scheme's approach to return to work; it would now appear that NSW leads the charge in employer provided retraining and re-education within workers compensation schemes. We are mindful of the ease with which employer funded training and training leave increases exponentially once there is a legislative basis for its provision, as is now the case given s 64C in the amendment.

11. Now employers are forced to bear an additional $1,000 in claims costs if a worker "accepts an offer of employment" even where, for valid and sound reasons, their continued employment of the worker is no longer possible, or where a worker has successfully challenged the availability of suitable employment with the pre injury employer. For many employers, typically smaller or those workplaces with a limited range of duties, suitable duties are simply not possible for the injured worker.

12. "*Work assistance*" has been deliberately defined in the amendment to be broad and all encompassing to be limited only by those restrictions decided by the regulator. As noted above, as this additional return to work assistance is to be paid by the individual employer as a punitive cost incentive to retain the worker (a highly dubious incentive) the regulator is unlikely to impose highly restrictive limits on the types of work assistance and the circumstances in which it is paid. When increased assistance to workers to encourage their return to work was raised with us during consultations earlier this year, no mention was made of the intention to have employers pay for this in their cost of claims. The amending legislation was introduced without any consultation on its specific provisions.

[3] See AFEI Submission to the State Insurance Regulatory Authority of NSW (SIRA) Regulation of legal costs for work capacity decision reviews Discussion Paper 26 November 2015.

13. The additional payment of up to $8,000 for workers (with 20 per cent impairment) compensated for 78 weeks or more will be even more onerous for affected employers. Further the Discussion Paper states that in relation to the interaction between the new return to work assistance benefits and existing vocational rehabilitation (s 53) programs consideration will be given to proposed operational and administrative arrangements to:

- enable ready access to the new employment assistance benefit and the new education and training assistance benefit
- minimise the potential for delays and disputes
- avoid unnecessary complexity and administrative burden
- reduce the risk of fraudulent activity where training providers sell unsuitable courses to workers
- ensure workers are not adversely impacted by engagement in inappropriate education or training.

14. This suggests a predisposition to make s 64B payments the priority payment (over s 53 payments) and an even greater laxity in their availability. It is disturbing that the possibility of fraudulent activity or unsuitable courses is even raised, but does provide an indication of how readily available these payments are intended to be, even with the constraints of s 60 remaining operative.

15. We further note that the Discussion Paper in identifying the features of classes of education and training indicate significant shortcomings for most including that course fees, with the exception of Certificates I-IV, are likely to exceed the maximum amount payable. Presumably the intention is to utilise the employer funded payments in full then rely on s 53 payments for the balance. It will only be a matter of time before work capacity decisions are framed in the knowledge that vocational assistance and retraining are readily available options in the return to work suite of expenses.

16. This will be a very expensive outcome for experience rated employers. From past experience, claims expenses and their impact on premium can be readily manipulated in the premium formulation calculation. These new actual expenses are significant for individual employers who are now at risk of having these costs impact their premium at multiples of actual cost, depending on the formula adopted.

17. Funding made available under s 53 should take precedence over payments made under s 64B. No payment under s 64B should be made if the worker has received or is receiving any payments funded under s 53 (including the two payment tiers in the Transition to Work Program, or a WorkCover Vocational Program). Any payments

under s 64B should only be made if the worker has remained in receipt of workers compensation payments and is receiving payments at the time of accepting the offer or making application for vocational retraining. Workers who have accepted any form of damages settlement lump sum or commutation should not be entitled to work assistance or vocational retraining.

18. Payments should not be available to those workers whose employer has offered suitable duties with the pre injury employer, or where return to work with the pre injury employer will impede recovery and any return to work.

19. Stringent limits must be imposed. In terms of the $1,000 job offer acceptance payment, "accepting an offer of employment" is open ended and uncertain. For a start, the payment should be limited to offers of permanent employment and be limited to a three month period after the job offer is made and be utilised once only.

20. It is readily foreseeable that the $1,000 will become an automatic payout to all workers accepting a job offer. The decision to hand over $1,000 to each worker who has accepted a job offer should not be left to the rehabilitation provider. The reasons for the expenditure and evidence of costs must be provided by the worker to the agent and subject to an approval process. Expenditure must be approved by the agent (and subject to the principles set out for s 53 payments) prior to payment.

21. At the very minimum, the eligibility, assessment, quality assurance and principles which apply and are set out in the WorkCover *Retraining, Equipment And Workplace Modification Guidelines* should also apply to s 64B payments, along with the provisions of s 60.

22. The payment of up to $8,000 will be even more onerous for the employers involved who will derive little satisfaction from knowing that relatively fewer workers across the scheme receive this compensation. Employers are unlikely to view the scheme in a constructive manner when it is apparent that it has built-in elements which will increase the costs of the claim, over which they have little control. Nor should vocational retraining be seen as the panacea for those who are assessed as having no current work capacity.

23. It is well established that workers who have been on compensation and out of the workforce for lengthy periods are least likely to seek re employment, in any form. Long term experience shows workers are unlikely ever to return after 12 months (or even after 12 weeks).

24. Workers' compensation scheme design and scheme management, ie regulator policy and practice have a major effect on return to work outcomes, and scheme costs. Paying workers incentives to accept a new job will amount to nothing more

than an additional premium cost for employers unless that job is permanent and a durable return to work. Providing retraining may result in greater employability but unless the approval process in the funding decision is highly disciplined, focussed and demonstrates a clear pathway to an actual job is paramount it will again be a direct cost to employers without a corresponding benefit to the scheme.