Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2024

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Submission to the Queensland Parliament Education, Employment, Training and Skills Committee

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INTRODUCTION

Ai Group welcomes the opportunity to make a submission in relation to the amendments to the Workers' Compensation and Rehabilitation Act 2003 (WCR Act), that are included in the Workers' Compensation and Rehabilitation and Other Legislation Bill (WCROL Bill).

We acknowledge that Ai Group was provided with an opportunity to be involved in consultation meetings with the Queensland Workers' Compensation Regulatory Service (WCRS) during the development of the WCROL Bill. However, timeframes for responding to the various proposals were extremely tight. It is our understanding that these timeframes were necessary due to the requirements of the government. The timeframes did not permit adequate consultation with industry.

Similarly, the timeframe for making a submission to the committee is very short, with less than a month between the final WCROL Bill being tabled in Parliament, and the closing date of submissions.

Our major concern in relation to the WCROL Bill relates to the amendments to the definition of worker and employer. However, we also wish to raise some additional issues related to the increasing obligations and penalties that have been included in the WCROL Bill.

DEFINITION OF WORKER AND EMPLOYER

Ai Group is concerned about the approach that is being taken in relation to amending the definition of employer and worker in the WCR Act, via amendments to section 11 (Who is a worker) and schedule 3 (Who is an employer in particular circumstances).

We have previously raised our concerns with WCRS who were responsible for the consultation process, and through a letter sent to The Hon Grace Grace on 12 April 2024.

We understand that these amendments are being made to implement part of the government's response to the 2023 review of the operation of the Queensland workers' compensation scheme, which recommended changes to, amongst other things:

> *facilitate coverage by the system of insecure workers in the gig economy who may otherwise be exposed to uncompensated risk.*

We note that the Explanatory Notes go some way to alleviate our concerns, by stating the following:

> *The Bill provides a regulation making power that is limited to regulated workers who are covered [*] by a minimum standards order, minimum standards or collective agreement made by the Fair Work Commission under the FW Act… This means standard regulatory safeguards apply if the Government proposes to consider exercising the regulation making power. Under Queensland Government policy, the proposal would be subject to regulatory impact analysis and public consultation.*
>
> *Additionally, any regulation that is made under the power would be subject to a disallowance motion under section 50 of the Statutory Instruments Act 1992 (SI Act).*
>
> *Identical safeguards apply to the exercise of the proposed power to prescribe entities as "employers" by regulation.*
>
> [*] Please see our comments below in relation to "covered".

However, it remains our view that using this approach to effect legislative change before there is any certainty as to the content or coverage of any minimum standards orders (MSO), minimum standards guidelines (MSG) and collective agreements is not appropriate or sensible.

Further, given the short timeframes that were provided for consulting on the content of the Bill, we are concerned that insufficient time may be made available to accurately assess any proposed regulations. This is particularly the case given that it will require the joint knowledge of workers' compensation specialists and those who have an in depth understanding of the new regulated workers provisions in the FW Act, together with the detail of the specific MSOs, MSGs or collective agreements that are made.

We acknowledge that the changes made by the WCROL Bill create a platform to enable consideration of making some regulated workers be covered by the WCR Act, and that this will not be automatic.

However, this will mean that every application made to the Fair Work Commission (FWC) under the regulated workers provisions will be considered in a context in which there is significant doubt about what the potential impacts arising from workers' compensation arrangements in Queensland. This is highly likely to complicate and delay the conduct of any proceedings associated with the making of the relevant orders, guidelines or collective agreements.

The changes as proposed through the WCROL Bill will potentially impact much more than the "gig economy". It is also intolerably unclear how the legislative scheme would work in the context of the diverse arrangements that are utilised in the gig sector and the raft of other contracting relationships that potentially fall within the scope of the proposed amendments.

Ai Group represents a range of significant organisations that stand to be affected by the proposed changes.

Significant concerns

We have significant concerns with the WCROL Bill and the amended definition of "worker" and "employer".

Proposed section 11 will include in the definition of 'worker':

> *"…(b) a person who is a regulated worker under the Fair Work Act 2009 (Cwlth) if –*
>
> *(i) a minimum standards order, minimum standards guideline or collective agreement applies to, or covers, the person under chapter 3A of that Act; and*
>
> *(ii) the person is prescribed by regulation to be a worker."*

Proposed Schedule 3 insertion:

> *"9 A person is the employer of a person who is a worker under section 11(1)(b) if:*
>
> *(a) the person is a regulated business under the Fair Work Act 2009 (Cwlth); and*
>
> *(b) a minimum standards order, minimum standards guideline or collective agreement applies to, or covers, the person under Chapter 3A of that Act; and*
>
> *(c) the person is prescribed by regulation to be the employer of the worker."*

It is our strong view these two amendments are unworkable, including for the following reasons:

- The regulated worker framework under the FW Act is predicated on the basis that if an MSO applies in relation to particular work, the "employee-like worker" or "road transport industry" is not an employee of any person in relation to that work. Being "*covered*" by an MSO should not be the basis for being covered under the WCR Act because being "*covered*" by an MSO does not impose obligations on a person, and a person does not contravene a term of a MSO, unless the order **applies** to the person. It would be nonsensical for a regulated worker in respect of whom a MSO did not in fact apply to then be a "worker" under the WCR Act merely because of the order's existence.

- The regulated worker provisions in the FW Act require the FWC to take into account specific matters through a 'minimum standards objective' when making an MSO. However, these matters do not align with, and are not relevant to, the object of the WCR Act.

- MSGs are non-binding and accordingly should not logically be used as a basis for activating legally binding obligations under the WCR Act.

- Collective agreements are consent-based instruments and should not logically be used as a basis for activating legally binding obligations under the WCR Act. Additionally, this may disincentivise parties from making such agreements.

- An MSO, MSG or collective agreement may deal with insurance and other related terms. It is entirely foreseeable that the proposed amendments may create an additional and different workers' compensation entitlement for "regulated workers" under the WCR Act which operates at the same time, and as a stand-alone obligation dealing with insurance, separate to any new obligation established under an MSO. It is also unclear how any subsequent regulations would take into account the structure and detail of the MSO. This is likely to have the following effects:

    - it will create uncertainty and difficulties for parties subject to the respective overlapping regulatory regimes;

    - it will create inconsistencies across industries, and businesses, where different MSOs, MSGs or collective agreements apply;

    - it will impose significant and unjustified cost imposts on intermediaries, many of whom already provide accident insurance coverage at no cost to the worker to ensure regulated workers are not "exposed to uncompensated risk";

  - it will create significant difficulties for regulators and authorities in managing how the rights and obligations under the two pieces of legislation interact – noting that the FWC, WCRS and WorkCover QLD have different drivers and requirements in respect of compliance and enforcement;

- There is no alignment in the timing or duration for MSOs, MSGs and collective agreements and the circumstances relevant to the WCR Act – for example, if any of these instruments are varied, terminated or if they expire the person will no longer be a "worker" under the WCR Act, changing the status of the worker without direct reference to the WCR Act or WCR Regulations.

- The proposed definition does not consider how the full extent of obligations and entitlements under the WCR Act will operate or apply in respect of "regulated workers". Many obligations and entitlements under the WCR Act are not appropriate for the circumstances of 'regulated workers' (or the intermediaries and other affected parties). For example, the WCR Act does not address circumstances where a "regulated worker" provides services on behalf of several intermediaries at the same time, making it unclear who is responsible for paying premium and where liability would lie if an injury occurred.

- There remains an inappropriate lack of any reasonable limitation or guardrails related to the government's capacity to prescribe by regulation that a "regulated worker" is a "worker" for the purposes of the WCR Act. It is essential that industry is provided greater clarity as to which 'regulated workers' may be caught.

- There has been no effort to alter the broader scheme of the WCR Act to render it capable of applying in the context of the kinds of contractor arrangements that may be caught by the modified scope of the legislation. To put it bluntly, if the scope of the WCR Act is amended as proposed, the substantive content of the legislation would not be "fit for purpose". Rehabilitation and return to work obligations are not appropriate for workers who work intermittently with no ongoing relationship with the platform.
  The ability to offer suitable duties in these scenarios can be extremely difficult in situations where the work is intermittent and independent. Before consideration could be given to amending the WCR Act to apply to "regulated workers", the WCR Act will require a wholesale review to ensure its application to these workers is workable.

- The proposed widening of section 11(1) and schedule 3, will capture a broad range of contractors who are not "in the gig economy" as envisaged by the 2023 Review. For example, as drafted it includes not only "employee-like workers" performing work for digital labour platforms but also road transport contractors, many of which do not work in the gig economy. This broad application is inappropriate and unjustified.

There should be no amendment to the definition of "worker" for the purposes of the WCR Act at this time. If amendments are to be made in the future, it is essential that the WCRS and government give careful consideration as to:

- whether the workers compensation framework under the WCR Act is capable of delivering a fit for purpose solution to the insurance needs of gig workers; and/or

- whether any such amendment is necessary, given that the FWC is able to consider insurance matters when making an MSO in relation to "regulated workers" under the FW Act and the inevitable interaction between the regulatory regimes.

It is essential that all stakeholders are provided with the opportunity to provide input through ongoing consultation regarding any further action by government in relation to any legislative requirements relating to workers compensation obligations and 'regulated workers'.

Finally, on this issue, we note that work is currently underway at Safe Work Australia to develop a nationally consistent approach to workers' compensation for the gig economy. It is Ai Group's view that amending the Queensland legislation before the work at Safe Work Australia is completed may lead to Queensland having a completely different approach to the rest of the country.

This will be particularly difficult when considering any interactions between the national Fair Work System and state-based workers' compensation legislation and noting the concerns we have expressed above.

Ai Group asks that the committee recommends removal of the sections of the WCROL Bill that will change the definition of worker and employer, with a view to keeping the status quo until a decision is made at Safe Work Australia about a nationally consistent approach to workers compensation for gig workers.

OBLIGATIONS AND PENALTIES

New obligations placed on employers

The WCROL Bill establishes a range of increased obligations for employers, including but not limited to:

- the provision of information statements to workers;
- a requirement to provide information to the regulator in response to a written notice within 5 business days of receiving the notice;
- a requirement to have a rehabilitation and return to work plan in place within 10 days;
- requirements to comply with scheme directions and codes of practice (the extent of which is still to be determined);
- an obligation to provide the insurer with written evidence of the inability to provide suitable duties, expanding the current obligation to require the employer to advise the insurer whey the employer believes it is not possible to provide suitable duties; and
- new obligations on host employers to cooperate with a labour hire worker's employer by taking all reasonable steps to support the employer to meet their obligations in relation to rehabilitation and the provision of suitable duties.

New offence in relation to "claim suppression"

Under the current s.109 of the WCR Act, an employer must not pay to a worker an amount, either in compensation or instead of compensation, unless the worker has made a claim for compensation and advised WorkCover of the payment. The penalties associated with this are specified in s.109A as a penalty equal to 50% of the premium payable for the period.

The WCROL Bill will insert an additional provision that makes it an offence to give a benefit or cause detriment to a person if the reason is to influence the worker not to make a claim or otherwise pursue an entitlement to compensation (new section 46A). The maximum penalty for doing so is 500 penalty units ($77,400).

These types of actions are often referred to as "claim suppression". However, it is not always the intention of employers to suppress a claim; often the employer is wanting to support the worker and may also pay for treatment. Ai Group is concerned that it may be difficult to identify whether the action was taken to support the worker, or to influence the worker not to make a claim or otherwise pursue an entitlement.

It may be, with all good intentions, that the employer has incurred significant costs to genuinely support the worker in a manner that has not been detrimental to the worker. Particularly in relation to a small to medium sized employer, the costs incurred may be significantly more than they would have paid in additional premium if the claim had been lodged with WorkCover.

It would be inappropriate to then also prosecute the employer for a genuine mistake and require payment of a penalty, based on the employers' desire to assist a worker.

This provision unreasonably creates multiple options for penalties

It is Ai Group's view that, if this provision is to be inserted into the WCR Act, then it should replace section 109 and 109A, rather than create an additional avenue of penalty for what is effectively the same breach.

If this is not done, the employer may be required to pay a premium penalty to WorkCover, and also pay a penalty if prosecuted.

New and increased penalties

The WCROL Bill establishes a range of new offences with penalties attached, and also increases the penalties currently applicable to existing offences.

If implemented, the largest maximum penalty applicable to an employer (other than a self-insurer) under the WCR Act will be 500 penalty units ($77,400). In some circumstances, this is a 10-fold increase. For example, the current offence related to an employer's obligation to assist or provide rehabilitation (s.228) has a maximum penalty of 50 penalty units ($7,740); the WCROL Bill amends this penalty to 500 penalty units ($77,400).

We understand that these increased penalties will only be applicable when an employer is in breach of the law. Compliance with obligations under the WCR Act are important to the worker. They are also important to employers, with increases in scheme costs associated with non-compliance having an impact on the financial viability of the scheme and potentially an increase in the average premium required to be collected.

However, through engagement with our membership (who are better informed than many employers who are not members of an employer organisation), we often identify that employers are not aware of all their legal obligations in relation to workers' compensation. This is especially the case in small to medium organisations that have not had a recent workers' compensation claim.

It is imperative that there is a comprehensive awareness and education program that highlights the new obligations and the significance of the maximum penalties. This is particularly important for obligations that exist even when no claim has been made, e.g., the new requirement to provide workers with an information statement.

Compliance and enforcement

The WCROL Bill inserts a new requirement on WorkCover or a self-insurer that they must inform the Regulator if they form a reasonable belief that specific offences have occurred.

It is Ai Group's view that this should be accompanied by a requirement that WorkCover or the self-insurer demonstrate that they have previously:

- advised the offending party of their legal obligations in relation to the matter;
- provided guidance on how to comply;
- allow an appropriate amount of time for the offending party to comply;
- warned the offending party of their obligation to report the offence to the Regulator; and
- advised the offending party of the potential action that the Regulator may take in relation to the matter.

It would seem to us that an approach such as this would increase the level of compliance, for the benefit of the worker, the employer and the scheme.

An immediate referral to the Regulator, as soon as WorkCover or a self-insurer becomes aware of a breach, has the potential to delay compliance. It may also create an unreasonable demand on the resources of the Regulator for an issue that could be more readily addressed by the self-insurer or WorkCover.

Penalties applicable to the insurer

A small number of offences by insurers are dealt with through penalty provisions. The largest of penalty is 1,000 penalty units ($154,800).

Ai Group acknowledges the importance of creating obligations for insurers and holding them to account, particularly as one of the offences that carries this large maximum penalty relates to the insurer's responsibility for rehabilitation and return to work (s.220).

However, as the most significant insurer in the scheme is WorkCover, it is unclear to us how the application of a monetary penalty (which is ultimately paid for by employers through their premiums), can be beneficial to the scheme.

We note that there is currently a maximum penalty related to s.220 of 50 penalty units. It would be beneficial to understand how the Regulator currently monitors and enforces this provision and how often WorkCover has been required to pay this monetary penalty. The significant increase in the maximum penalty indicates that there are future intentions to pursue such penalties. If not, the value of increasing the maximum penalty for related to this section is questionable.

Commencement

The WCROL Bill specifies a small number of amendments that will commence "on a day to be fixed by proclamation". We do not yet know what this date will be. The WCROL Bill appears to be silent on the commencement date of the remainder of the amendments. We are concerned that these other provisions will commence on the day of assent.

The reason for this concern is about how employers can be expected to understand and comply with new obligations, which carry significant penalties, without some period of time for awareness and education.

We encourage the committee to recommend that a transitional period be introduced for all new requirements, and that the increased maximum penalties do not apply until there has been a period of implementation.

Such a transition period would enable appropriate awareness and education for employers to maximise the ability for employers to understand their obligations and implement systems to comply.

In addition, there should be specific obligations on insurers, especially WorkCover, to provide adequate information to employers who have not previously experienced a claim. This could be done in the form of a standardised information sheet which advises the employer of their key obligations related to claims and includes information about the size of penalties, expressed as a dollar value in addition to the number of penalty units.

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