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Accident Compensation Amendment Act March 2010

Background

On 10 December 2007, the Victorian Government commissioned Peter Hanks QC to undertake a review of the Victorian WorkCover scheme. The aim of the review was “to reduce the administrative burden on employers, improve the support and services provided to injured workers and improve overall efficiency of the accident compensation scheme”.

Tim Piper, Branch Director (Victoria) of the Australian Industry Group (Ai Group) was appointed to a tripartite Stakeholder Reference Group to ensure that employer views were heard during the process.

In March 2008 a discussion paper was released and public comment was sought. The Ai Group response to that discussion paper can be found at http://pdf.aigroup.asn.au/representation/submissions/AiGroup_submission_%20AC_Act_May2008.pdf

In August 2008 Mr Hanks QC provided a report to the government outlining 151 recommendations. The recommendations, and the government’s response, can be found at http://pdf.aigroup.asn.au/ohs/170609_Government_Response_Table.pdf.

In December 2009, the Victorian Government introduced into parliament the 350 page Accident Compensation Amendment Act 2009 (The Act). The Act was passed on 11 March 2010.

Many of the amendments will be effective from 5 April 2010.

This document has been designed to outline the key changes that will be made by the Act. It does not purport to provide a detailed analysis of every change that will be made to the Act.

Summary of Key Provisions

Entitlement Provisions

Stress Claims – Exclusion for Reasonable Management Action – effective 5 April 2010

Section 12 of the Act will replace the current section 82(2A) with a broader provision which will result in the exclusion of claims related to “mental injury” if they are related to “reasonable management action”. The new provision should overcome the previous difficulties that have occurred when a person has lodged a claim for “stress” related to performance management; unless the person was in a formal disciplinary process the exclusion could not be applied. It is important to note that, for the exclusion to be applied, the injury must be caused “wholly or predominantly” by the management action.

Current Provision	Amended Provision
<p>Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from—</p> <p>(a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or</p> <p>(b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or</p> <p>(c) an expectation of the taking of such action or making of such a decision.</p>	<p>There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury caused wholly or predominantly by any one or more of the following—</p> <p>(a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer; or</p> <p>(b) a decision of the worker's employer, on reasonable grounds, to take, or not to take any management action; or</p> <p>(c) any expectation by the worker that any management action would, or would not, be taken or a decision made to take, or not to take, any management action; or</p> <p>(d) an application under section 81B of the Local Government Act 1989, or proceedings as a result of that application, in relation to the conduct of a worker who is a Councillor within the meaning of section 14AA.”</p>

Further information about what could be included in the definition of “management action” is outlined at section 14 of the Act and will be inserted at section 82(10) of the Act.

management action, in relation to a worker, includes, but is not limited to, any one or more of the following—

- (a) appraisal of the worker's performance;
- (b) counselling of the worker;
- (c) suspension or stand-down of the worker's employment;
- (d) disciplinary action taken in respect of the worker's employment;
- (e) transfer of the worker's employment;
- (f) demotion, redeployment or retrenchment of the worker;
- (g) dismissal of the worker;
- (h) promotion of the worker;
- (i) reclassification of the worker's employment position;
- (j) provision of leave of absence to the worker;
- (k) provision to the worker of a benefit connected with the worker's employment;
- (l) training a worker in respect of the worker's employment;
- (m) investigation by the worker's employer of any alleged misconduct—
 - (i) of the worker; or
 - (ii) of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness;
- (n) communication in connection with an action mentioned in any of the above paragraphs;

Circumstances in which weekly payments are reduced because of conviction for driving offences – effective 5 April 2010

A new section 82A will establish revised rules associated with injuries that relate to driving offences.

If a worker is convicted of a drink-driving offence in relation to an incident that creates an entitlement to workers compensation under the Act, a worker's entitlement to weekly compensation during the first 130 weeks will be reduced related to their blood alcohol content (BAC) as follows:

- If the BAC is more than the legal BAC (zero or 0.05 depending on the circumstances) and less than 0.12; reduced by one third;
- If the BAC is not less than 0.12 and less than 0.24; reduced by two thirds;
- If the BAC is more than 0.24; no entitlement to compensation.

Further this section will create a non-entitlement for the first 130 weeks if a worker is convicted of a drug-driving charge, an offence related to refusing to cooperate with drug or alcohol testing or if the worker is convicted of dangerous or culpable driving under the Crimes Act

These sections do not apply if the injury results in death or severe injury, or the worker satisfies the Authority that the offences (other than those related to refusing to be tested) did not contribute in any to the injury.

Outworkers – effective 5 April 2010

Section 17 of the Act will establish a clear linkage between the Outworkers (Improved Protection) Act 2003 and the deeming of workers under the Accident Compensation Act 1985.

Ensuring timely access to benefits – effective 5 April 2010

Sections 19, 20 and 21 of the Act will change the way in which claims can be lodged as follows:

- A claim for weekly compensation will be valid, even if it is received without the prescribed "certificate of capacity"; however, payments can not be made until a valid certificate of capacity is received.
- In general, a claim is deemed to have been made, even if there is a defect, omission or irregularity in the claim.
- The Agent or self-insurer must make a decision on a claim for weekly benefits within 28 days of receiving the claim, or if the claim was not accompanied by a certificate of capacity, within 28 days of receiving the certificate.
- The Agent or self-insurer must make a decision on a claim for medical and like expenses within 28 days of the receiving the claim (previously there was an administrative arrangement to make a determination within 60 days).

It is anticipated that the Victorian WorkCover Authority will issue guidance material to assist employers and workers to fully understand how these provisions will be applied in practice.

It is important to note that, if the employer forwards the claim form to the Agent without a certificate (as required under the modified laws, there is also an obligation to forward the initial certificate within ten days of receiving it.

Provisions of the Act also allow the Minister to make guidelines related to the "form and manner" in which a claim may be given, served or lodged.

Changes to weekly benefits – Relevant to all claims

Second entitlement period

Section 31 of the Act will create a new section 93A and 93B which outline the manner in which weekly compensation applies to the first and second entitlement periods. Section 30 of the Act outlines the various ways that the first and second entitlement periods have been calculated during the life of the Act.

The new section 93B will amend the weekly compensation amount during the second entitlement period (week 14 to week 130 for claims lodged after 1 January 2005) from 75% of pre-injury average weekly earnings (PIAWE) to 80% of PIAWE. If a worker has a current work capacity, the weekly benefit will be calculated as 80% of the PIAWE, less 80% of current weekly earnings.

It is important to note that a small number of claimants with claims that commenced prior to 12 November 1997 will continue to receive a higher percentage.

Changes to weekly benefits – Relevant to claims on or after 5 April 2010

Overtime and Shift Penalties

Section 4 of the Act will modify section 5A(1A) to allow for overtime and shift penalties to be included in pre-injury average weekly earnings (PIAWE) for the first 52 weeks of weekly compensation. The provision currently applies for only 26 weeks.

5A(1C) will also be amended to change the manner in which average overtime and shift penalties are calculated. The Act establishes a formula which divides A by B; where A is the value of overtime and shift penalties and B is the weeks to be taken into account to calculate the average. The way in which the formula A/B is calculated will be redefined, with B being changed as follows:

Current provision	New provision
B is the number of weeks in the relevant period ... during which the worker worked or was on annual, sick or other paid leave	B is the number of week in the relevant period ... during which the worker worked or was on paid annual leave

New maximum weekly benefit

Section 7 of the Act will amend the maximum weekly compensation amount from \$1300 to “twice the State average weekly earnings”. Section 28 of the Act defines “state average weekly earnings” as “the latest average weekly earnings as at 30 May in the preceding financial year of all employees for Victoria published by the Australian Statistician in respect of the December quarter of that preceding financial year or, if that is not available, the latest available quarter”

WorkSafe Victoria have advised that the maximum rate from 5 April 2010 will be \$1760. It is important to note that the maximum weekly benefit for claims lodged before 5 April 2010 will remain unchanged.

All maximum amounts will be adjusted on 1 July 2010.

Surgery after second entitlement period

Section 31 of the Act will insert section 93CA and create a limited ability for a worker who is back at work to claim weekly compensation for a period of up to 13 weeks if they are incapacitated due to surgery after the second entitlement period has expired.

Superannuation

Section 37 of the Act will create an entitlement, at section 93CE of the Act, for the payment of superannuation contributions for workers who have received an aggregate period of 52 weeks compensation and have not attained the age of 65 years.

Notional earnings

Section 28(4) of the Act will repeal the definition of “notional earnings”. This definition has been used, sparingly, to reduce the weekly compensation payable to a worker based on what the Authority or self-insurer “determines the worker could earn from time to time (including, but not limited to, the amount of current weekly earnings)”.

However, new words that will be inserted by section 45 of the Act appear to deal with a number of the circumstances in which notional earnings should have been applied. In summary, section 45 will create a new section 114(2A) which allows for weekly compensation to be reduced if:

- the worker no longer resides in Victoria; or
- employment was terminated because of misconduct; or
- the worker has resigned or reduced their hours worked for reasons other than their incapacity.

Accrual and Taking of Leave – interaction with the Fair Work Act – effective 1 January 2010

Section 130 of the Fair Work Act has placed restrictions on the taking or accruing leave or absence while receiving workers' compensation, as outlined below:

- (1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) ... when the employee is absent from work ... receiving compensation payable under a law ... that is about workers' compensation.
- (2) Subsection (1) does not prevent an employee from taking or accruing leave ... [if] permitted by a compensation law.
- (3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

Section 45(3) of the Act will insert a new section 114(2D) which states that:

If the current weekly earnings of a worker are reduced because the worker is on paid annual or long service leave, the Authority or self-insurer must not, by reason only of that reduction, alter the amount of compensation in the form of weekly benefits.

Further, section 42 will amend section 97 to state that, in relation to weekly compensation regard will not be had to any sum paid or payable “in lieu of accrued annual leave or long service leave”.

Non-entitlement periods – effective 5 April 2010

Section 96 of the current Act establishes the manner in which weekly compensation benefits are adjusted due to the receipt of pensions and lump sums; i.e. the creation of a “non-entitlement” period. Section 40 of the Act will modify this section in a number of ways. Most importantly for employers, the non-entitlement that has previously been created by 96(1)(b) and (2)(a) relating to “redundancy or severance payment received by the worker” have been repealed. This means that, in future, redundancy payments will no longer create a non-entitlement period for the worker.

Employer may request reasons for a decision on a claim – effective 5 April 2010

Section 43 of the Act will establish a new section 109AA which enables an employer to seek information from the Authority (Agent) regarding the reasons for a claim being accepted or rejected. The Agent must respond to this request within 28 days.

Employer Objections – effective 1 July 2010

Section 91 of the Act will establish a new Division 3AA – Employer Objections. This Division creates two bases on which an employer can lodge an objection to the Agent's decision:

- The alleged worker is not a worker within the meaning of the Act; or
- The claimed employer was not the correct employer of the worker at the time of the injury or death.

Return to Work provisions – effective 1 July 2010

Part VI – Occupational Rehabilitation, Return to Work Plans and Risk Management of the Act will be repealed from 1 July 2010. These provisions will be replaced with performance based criteria that will be supported by Ministerial Guidelines and Compliance Code(s). See Part 13 of the Act.

This means that the specific requirements to develop a Rehabilitation and Risk Management Program and to document return to work plans will no longer be prescribed by the Act. The intent of this approach is to ensure organisations focus on achieving sustainable return to work, rather than on getting the paperwork right. Many employers will find that the current requirements are working effectively in their organisation and will choose to continue to manage return to work without any significant changes.

It is anticipated that the Ministerial Guidelines will be made by 1 July 2010. However, the Compliance Code is not scheduled for completion until 31 March 2011. Hence, transitional provisions outlined at section 350 of the Act generally state that if an employer is complying with the obligations outlined in Part VI of the current Act they will continue to be compliant until 31 March 2011.

The specific criteria that will be included in the modified provisions are summarised below:

Provision of Information

An employer must make information available to the employer's workers about

- (a) Obligations of employer
- (b) Rights and obligations of workers
- (c) Name and contact details of the authorised agent
- (d) Name and contact details of the return to work coordinator
- (e) The procedure for resolving return to work issues

Return to Work Coordinator

An employer must nominate a Return to Work Coordinator if remuneration is greater than \$2m (currently \$1m) ... "who has an appropriate level of seniority and is competent to assist the employer to meet the obligations of the employer under this Part to be a return to work coordinator"

Employer Obligations

"An employer must, to the extent that it is reasonable to do so, provide [duties] to a worker for the duration of the employment obligation period (12 months)"

"An employer must, to the extent that it is reasonable to do so, plan the return to work of a worker..."

Obligations relating to injuries to labour hire employees

In order to increase the return to work opportunities for labour hire employees, the Act will insert a new provision (section 199) which states that "A host must, to the extent that it is reasonable to do so, cooperate with the labour hire employer, in respect of action taken by the labour hire employer in order to comply with their return to work obligations". It is expected that the Victorian WorkCover Authority will develop guidance material to assistance labour hire employers and host companies to understand how this provision will work.

Obligations of Workers

The Act will create sections 200 to 206 of Act which continue to require that injured workers cooperate with the employer and make reasonable efforts to actively participate and cooperate in planning for the worker to return to work. The manner in which compensation may be terminated for non-compliance with these provisions are outlined in section 205.

Suitable Employment

Section 74(3) of the Act will modify the definition of suitable employment outlined in section 5(1) of the Act and section 74(4) modifies the definition of suitable employment for the purposes of Rehabilitation and Return to Work.

Return to Work Inspectorate

The Return to Work inspectorate which has been operating as an advisory unit under the current Act will be formalised by the provisions of the Act. The inspectorate will have similar powers to OHS inspectors, including the right to issue improvement notices. Employers will be able to challenge notices through a formal Internal Review process.

Employer Premiums – effective 1 July 2010

Declaration of remuneration

Section 94 of the Act will amend the manner in which some items will be included in remuneration for the purposes of calculating the premium. These items are fringe benefits (which will remove some of the current exemptions and apply the grossed-up value in the calculation), motor vehicle allowances and accommodation allowances. Further information about the impact of these changes will be made available as premium information is distributed to employers by their Agents.

Provision of information and Premium avoidance schemes

New provisions will be introduced by sections 97 to 99 which create significant penalties for persons (whether the employer or their adviser) who makes a false or misleading statement or suggests to an employer that they make a false or misleading statement. Maximum penalties include \$105,138 for a body corporate; and \$21,027.60 plus 6 months imprisonment for an individual.

Section 108 of the Act will introduce section 26A of the Accident Compensation (WorkCover Insurance) Act 1983 outlining that the Authority may charge a default premium to an employer who they determine has entered into a premium avoidance scheme.

Premium Review

Section 114 of the Act will create a new Part 2A in the Accident Compensation (WorkCover Insurance) Act 1983 which creates a formal process for employers to seek a review of their premium. The Authority must conduct a review of an application within 90 days of receiving the applications. If the employer is not satisfied with the outcome of the review they will be able to appeal to the Supreme Court.

Within this part it will be clearly identified that an employer is required to pay the premium, or default penalty notice, that is under review whilst the review is being considered.

Groups

Section 116 of the Act will make amendments to the wording utilised to establish “groups” of employers for the purpose of determining industry classifications for each workplace. Employers who operate a number of companies in Victoria that are, or may be, “grouped” should pay attention to these changes.

Discrimination – effective 1 July 2010

The current limited provisions related to discrimination outlined in section 242(2) and (3) will be repealed by section 22 of the Act. Section 23 of the Act will insert new sections 242AA to 242AF which establish an offence to engage in discriminatory conduct.

The provisions, which relate to employers and prospective employers, will create an offence for discriminatory action taken against an employee or prospective employee for the reasons that they have:

- Notified an injury;
- Taken steps to pursue a claim for compensation;
- Given or attempted to give a claim to an employer; or
- Complied with a request to provide information to the Authority.

The penalties associated with this offence are significantly higher than those under the current Act (\$140,184 compared to \$2,920.50). In addition to these penalties the Act will establish a right for the worker to take civil action for damages or reinstatement.

It will be a defence to a prosecution or claim if:

- The conduct was necessary to comply with OHS requirements;
- The worker or applicant was unable to perform the inherent requirements of the employment, even if the employer had made reasonable adjustments; or
- The worker was engaged in fraud or dishonesty in relation to the claim for compensation.

Penalties – effective 5 April 2010

Penalties under the Accident Compensation Act will be significantly increased by Part 15 of the Act. A summary of the major penalty provisions are outlined below:

- \$140,184 (1200 penalty units) plus access to civil action for discrimination (currently \$2,920.50)
- \$140,184 (1200 penalty units) for assaulting, intimidating or threatening an inspector; note also up to 2 years imprisonment for an individual (new provision duplicating the OHS Act)
- \$105,138 (900 penalty units)
 - corporation false statement (currently \$5,481); note also 6 months imprisonment for individuals
 - failing to provide suitable employment (currently \$29,205)
- Other penalties:
 - \$70,092 (600 penalty units), failing to – plan return to work; consult with worker, nominate a return to work coordinator; make information available to workers; cooperate with labour hire employer.
 - \$35,046 (300 penalty units) – related to the requirement for an injury register and failure to comply with decision of a conciliator
 - \$28,036 (240 penalty units), failing to – forward claim as required; make payments to worker; notify of return to work

Further sections of the Act which may be of interest to specific employers

Part 5 – Treatment Expenses

- Prior approval of medical and like services
- Modification of home or car

Part 6 – Lump Sum Benefits

Part 7 – Access to Justice for Seriously Injured Workers [Common Law Claims]

- Administrative arrangements

Part 8 – Payments for Family Members following Work-Related Deaths

Part 9 – Transparency in Decision-Making and Efficient Resolution of Disputes

- Medical question (relating to medical panels)
- Jurisdiction of the Magistrates' Court
- Use of documents relating to worker's claim
- Conciliation Officers and Senior Conciliation Officer

Part 11 – Recoveries

- Indemnity by third parties (hold harmless clauses will be made void)

Part 12 – Self-insurance