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

Following a number of consultation sessions with relevant stakeholder, the Federal Government and the Department of Employment have recently introduced the *Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill* 2015 (Cth) (**the Bill**) for consideration by Parliament.

The Bill proposes a range of amendments to the current *Safety, Rehabilitation and Compensation Act* 1988 (Cth) (**the Act**). The broad effect of the proposed amendments, as stated in the Explanatory Memorandum, is to:

- emphasise the vocational (rather than medical) nature of rehabilitation services and introduce measures designed to improve return to work outcomes under the Scheme;
- promote fairness and equity in outcomes of injured employees by targeting support for those who need it most; and
- strengthen the integrity and viability of the Scheme by clearly distinguishing between work and non-work related injuries, improving the quality of compensable medical treatment and support services, and limiting legal and medical costs

The proposed changes are explained in depth in the Explanatory Memorandum, which can be accessed here.

Rather than rehash that information, we have summarised the amendments that we consider will have the greatest impact on licensees below, and provided our views on the likely practical impact of those changes.

Sanctions

Schedule 15 of the Bill proposes significant changes to the sanctions available to licensees in circumstances where an employee is non-compliant. The aim of the amendments is to enforce "obligations of mutuality" between an employer and an employee.

There are two types of breaches that may attract sanctions:

- Remediable breaches – that is, a breach that the employee has been directed to remedy, such as failing to attend a medical appointment scheduled under section 57.
- Non-remediable breaches – that is, a breach that the employee is unable to remedy, such as the employee failing to accept or engage in an offer of suitable employment.

In the case of non-remediable breaches, the employee's rights to compensation (other than in respect of medical treatment) and to institute or commence proceedings are suspended for each breach.

For remediable breaches, the proposed sanctions regime progresses over three stages:

- For a first breach – the licensee must make a determination that the employee is subject to a level 1 sanctions regime. Then, the employee's rights to compensation (other than in respect of medical treatment) and to institute or commence proceedings are suspended.
- For a second breach – the licensee must make a determination that the employee is subject to a level 2 sanctions regime. Then, for a remediable breach – the employee's rights to compensation (other than in respect of medical treatment) and to institute or commence proceedings are suspended.
- For a third breach – the licensee must make a determination that the employee is subject to a cancellation regime. Then, the employee's rights to compensation (other than in respect of medical treatment) and to institute or commence proceedings are permanently cancelled in respect of all current and future associated injuries.

The suspension provisions do not affect an employee's entitlement to compensation for medical treatment. This is only affected by the final cancellation stage.

Each stage of the proposed sanctions regime is reviewable, notwithstanding the suspension or cancellation of the employee's rights to institute or commence proceedings. The aim of the review process is to ensure that fairness is upheld, however it is possible and perhaps even likely that the sanctions regime will result in an increased number of disputes.

The introduction of clear obligations and appropriate consequences for breaching those obligations is a welcome change for licensees. The three stage sanctions for remediable breaches will be particularly useful when dealing with employees who consistently fail to comply with the requirements of the Act.

Weekly compensation payments

Schedule 9 of the Bill proposes a number of changes to the payment of weekly compensation. Of particular interest to licensees are the changes to the step-down provisions.

The Act currently contains only one step-down – to 75% of an employee's NWE after 45 weeks. Amendments made to the Act in 2001 clarified that the step-down was to occur after an employee's period of incapacity exceeds 45 times his or her NWH.

In its research for the Bill, the Department of Employment noted that most States and Territories provide for more than one step-down, and that all jurisdictions provide for the first step-down to occur before 26 weeks. The delay in the step-down in the Act, coupled with the 2001 amendments (which often result in the step-down occurring much later) results in the Scheme being costly. It also fails to satisfy one of the guiding principles of the Act, which is to encourage employees to return to work. Research shows that employees under the Scheme who were off work for between 13 and 45 weeks were less likely to return to work than employees in alternative jurisdictions.

With this in mind, the Bill proposes changes to the step-down provisions as follows:

- **for the first 13 weeks** in capacity, an employee will be entitled to receive weekly incapacity payments worked out using a formula which reduces the employee's average weekly remuneration (as calculated under section 8 of the Act as amended) by the employee's applicable earnings. Applicable earnings are defined as the greater of:

  - the amount that the employee is actually earning in any employment, including self-employment; or
  - the amount the employee has been deemed able to earn in suitable employment pursuant to section 19.

- **after 13 weeks** of incapacity, compensation will be paid at an adjusted rate of 90% of the employee's average weekly remuneration less his or her applicable earnings. In effect, the employee will be able to earn no more that 90% of his or her average weekly remuneration.
- **after 27 weeks** of incapacity, compensation will be calculated using the formula of 90% of the employee's average weekly remuneration less his or her applicable earnings, to be paid at an adjusted rate of no more that 80% of the employee's average weekly remuneration. In effect, the employee will be able to earn no more that 80% of his or her average weekly remuneration.
- **after 53 weeks** of incapacity, compensation will be calculated using the formula of 90% of the employee's average weekly remuneration less his or her applicable earnings, to be paid at an adjusted rate of no more that 70% of the employee's average weekly remuneration. In effect, the employee will be able to earn no more that 70% of his or her average weekly remuneration.

The hours worked will no longer be calculated by reference to the maximum compensation week (as outlined in the 2001 amendments). Instead of being tied to the number of hours worked, the step-down points referenced to the number of weeks the employee has been incapacitated for work as a result of the injury.

The intended impact of the step-down changes is to increase productivity for employers by encouraging employees to return to work sooner, even if on a part-time basis. The practical effect of this is that licensees will be expected to increase their efforts to provide suitable employment for employees to facilitate this earlier return to work. The introduction of more stringent step-down provisions should also assist in reducing the number of employees who become entrenched in the workers' compensation system.

For employees, it is well recognised that there are general health benefits associated with working, and the new step-down provisions should encourage a return to work sooner.

The change is expected to result in an overall reduction in the cost of compensation for all licensees in the Scheme. After 13 weeks, employees will receive less compensation for incapacity than under the current Act, except for weeks 45 to 52, where they will be 5% better off under the proposed changes.

Permanent Impairment

Schedule 12 of the Bill sets out the proposed changes to the calculation of compensation for permanent impairment.

The Federal Government and the Department of Employment have recognised that the current system provides significant compensation to those who are less injured. The proposed amendments are therefore aimed at increasing the compensation payable to those who are severely injured by decreasing the compensation payable to those who are less injured. The Bill proposes to better target permanent impairment compensation by:

- Increasing the maximum total amount payable for permanent impairment to $350,000 (currently $243,329.42)
- Allowing employees who have sustained multiple injuries in the same incident to combine the permanent impairment assessments for those injuries to reach the 10% threshold for receiving compensation. This amendment effectively negates the decision of *Canute v Commonwealth* [2006] HCA 47.
- Changing the way in which compensation for permanent impairment is calculated. It will now be calculated using an algorithm rather than the current formula. The proposed algorithm will combine the permanent impairment and non-economic loss calculations. For example, using the proposed maximum of $350,000, the following compensation would be payable (approximates only):
    - for a permanent impairment of 10% - $8,700 (currently around $35,000)
    - for a permanent impairment of 40% - $100,000 (currently around $100,000)
    - for a permanent impairment assessed at 75% or higher - $350,000 (currently $180,000 for a permanent impairment of 75%)

The Bill also proposes that compensation for permanent impairment not be payable for secondary psychological injuries. This amendment reflects the current position in many States and Territories.

The cost comparison modelling undertaken between the current permanent impairment model and the proposed model shows that the changes are cost neutral to the scheme, but of great benefit to employees who have suffered serious injuries.

Conclusion

The Bill proposes a wide range of amendments to the Act. Given one of the major aims of the Bill was to improve the viability of the Scheme, the proposed changes, if accepted by Parliament, are likely to result in decreased overall costs to licensees.

The Bill is due to be debated in the next sitting of Parliament. We will keep you up to date of its progress.

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