

# Government Response to the Hanks Enquiry / Accident Compensation Act Amendment Bill

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# Introduction

- The Government has published its formal response to the Hanks review and a Bill is imminent – possibly before parliament this week
- The first proposal is to streamline and consolidate provisions into more easy to access and understand legislation
- There will be a staged introduction of the provisions in February and July 2010

# Claims Lodgement

- Available methods of lodgement are likely to be set out in Regulations, Ministerial Directions or approved by WorkSafe
- Likely to include approved electronic notification including fax and email, but might include telephone (as in NSW)
- Lodgement could be made by the worker, employer (representative) or 3<sup>rd</sup> party such as a medical practitioner, lawyer or union representative
- Safeguard is that a claim will be defective if insufficient information is provided to determine liability and that information is not within the knowledge of or ascertainable by the self insurer
- No known proposal for the removal of the requirement to sign a medical authority

# Defective Claims

- If there is a defect, omission or irregularity in the claim (form or electronic notification) the claim will remain valid unless the self insurer is unable to obtain that information from the worker (presumably within 28 days), or otherwise obtain the information

# No distinction between claims for Weekly Payments and Medical Expenses

- The distinction has been removed from the claim form and the Act will refer to claims for 'compensation'
- Liability must be determined for any claim for weekly payment and medical expenses within 28 days (there was no previously legislated time period for medical expenses)
- Claims for weekly payments will not need to be accompanied by a s.105 certificate; but
- Weekly payments will not be payable without proper medical certification

# Psychological Injuries

- Identified that s.82(2A) is unworkable, but there is a need to protect employers' management prerogatives
- The strict categories of transfer, demotion, discipline redeployment, retrenchment, dismissal, reclassification, leave of absence, promotion and benefit will be removed
- The defence is likely to be simplified to refer to reasonable management action only
- Likely that the reasonable action must still be the 'whole or predominant cause'
- Likely that expectation of that action will remain

# Return to Work – Self Insurer Obligations

- There will be an introduction of ‘return to work principles’ and it is likely that compliance will be set out in Regulations and/or Ministerial Directions
- May include requirements for employers to publish and make available return to work policies and procedures, compulsory consultation with employees and medical practitioners and stipulate competencies of RTW coordinators. Failures to comply may carry criminal sanctions
- Self insurers will be required to notify employees in advance of the conclusion of the 52 week period during which suitable employment must be provided

# Return to Work – Employee Obligations

- Failure to make reasonable efforts to RTW will result in a suspension for 28 days followed by a termination if the failure is not remedied
- There may be a series of notifications required but these are likely to be the subject of Regulations or Ministerial Directions

# Weekly Payments and Superannuation

- The method of assessing PIAWE will be reviewed to incorporate 'changes and trends in remuneration arrangements'
- Weekly payments will increase from 75% to 80% of PIAWE after the first 13 weeks
- Overtime will be included in the PIAWE calculation for the first 26 weeks
- The maximum weekly payment will increase from \$1,250.00 to \$1,753.80 per week
- Superannuation will be paid to a worker's nominated fund after 52 weeks of weekly benefits. Contributions will be based on 9% of the worker's weekly entitlement
- Weekly payments will be payable after the conclusion of the 130 week period for up to 13 weeks during recovery from a surgical procedure
- Weekly payments must be paid until a Common Law settlement sum is paid

## Section 93CD

- Section 93CD will be amended to require a determination within 28 days (reduced from 90 days)
- It is likely that entitlement will be determined by a self insurer without referral to a medical panel
- Disputes over capacity are likely to be then referred to a Medical Panel
- It is possible that an established entitlement may continue notwithstanding subsequent withdrawal of employment

# Annual and Long Service Leave

- Provisions to require payment of weekly benefits and long service and/or annual leave will be introduced
- These will not be applied to sick leave

# Section 96 Preclusion Period and Notional Earnings

- Section 96 will be effectively abolished
- The application of notional earnings to reduce weekly payment entitlements will be abolished

# Medical Expenses

- Amendments will require self-insurers and agents to determine liability for all claims for compensation within 28 days
- Introduction of a 28 day notice period before a worker's entitlement to medical and like expenses is terminated
- Introduction of guidelines regarding what is considered to be the reasonable costs of various categories of treatment

# Impairment Benefits

- Amendments will increase the maximum impairment benefit to the equivalent maximum common law damages payable for pain and suffering from \$396,690.00 to \$484,830.00 and indexed annually
- Increase impairment awards for spinal injuries by 10%
- Increase impairment benefit regarding 30% psychiatric impairment to the same level as a 30% physical impairment
- Introduce ‘consistent terminology’ with respect to hearing loss
- The date of injury for gradual process injuries will be the date of claim, if the employee is still employed or the last day of contributory employment
- Consider the introduction of a “one-stop-shop” to determine impairment claims

# Common Law

- Section 134AB(28) will be amended so that all weekly payments received after the worker's statutory counter-offer during the Section 134AB process are to be disregarded when comparing the judgement with the offers made
- Allow serious injury applications to continue after a worker dies from a cause unrelated to the injury to which the claim relates
- Legislate to allow self-insurers to be able to access medical information (in line with the current Form D)
- Permit only one s.134AB Serious Injury application per cause of action

# Death Benefits

- The maximum lump sum benefit will be increased from \$265,590 to \$484,830
- Weekly pensions are to be indexed annually
- A surviving partner living with the worker at the time of the worker's death will be deemed dependent on the deceased worker
- Expand benefits to include reasonable expenses incurred as a result of the worker's death
- Lump sum payments will be paid to non-dependents who suffer financial hardship

# Conciliation

- Conciliation Officers' power to direct the payment of medical expenses will be increased to \$5,000
- Their power to require parties to provide material will be replaced by a legislative obligation upon parties to exchange all relevant information
- Costs of workers attending conciliation for travel and lost income will be payable
- Reasonable costs of medical reports obtained by the ACCS will be payable
- No meaningful change to supervision and governance of Conciliation Officers' conduct
- Conciliation of disputes will not be mandatory where Court proceedings are already on foot

# Medical Questions and Panels

- Medical Panels will be permitted a discretion to refer back a non-medical matter to the referrer
- The defined Medical Questions will be amended to remove anomalies with respect to confusing wording

# Magistrates' Court

- Its jurisdiction will be extended to include all claims for statutory benefits claims, including claims for greater than 130 weeks of weekly payments
- The County Court will retain its present jurisdiction for s.134AB Serious Injury applications and Common Law claims

## Section 138 Recoveries

- Hold harmless clauses between labour hire companies and 'host employers' will be outlawed

# Self Insurance

- Eligibility will be considered through a two step process, a fee will be payable for applying and a decision must be made by the Authority within 12 months
- Amendments will allow WorkSafe to formulate guidelines to manage self insurers
- Enable the grant of a 6 year term of self insurance following the first approval
- Broaden the circumstances in which a licence can be reviewed and remove the notice period in the event of revocation
- Excess of loss deductibles to be permitted for up to a maximum of \$5 million
- Contribution fee changes have been deferred
- Introduce a requirement to report to WorkSafe annually regarding common law claims and instead introduce a reporting system of 28 days following the commencement of a Common Law proceeding

## Self Insurance (cont)

- Allow self-insurers to manage claims in existence prior to their self-insurance
- ‘Introduce guidelines that will create certainty regarding the measurement of liabilities and how disputes will be managed when a self-insurer moves to scheme insurance or the Commonwealth scheme’
- Require self insurers to document and publish their own claims management policies
- Legislate the current licence requirement to notify the Authority of strategically significant matters upon becoming aware of them
- Provide that a self insurer bears the Authority’s costs of licence revocation

## What won't be changed

- No provisional liability
- No reductions of the Common Law threshold to 20% WPI
- No strengthening of the s.134AB narrative threshold
- No radical changes to dispute resolution despite Hanks' identification of shortcomings
- No change to oversight and supervision of the ACCS in line with Hanks recommendations
- No increase in contributions

## What Self Insurers will need to do

- Scrutinise the new claims lodgement provisions, develop new procedures for determining the validity of claims and investigating claims where information is insufficient, rather than issuing defect notices
- Educate management with respect to the new lodgement criteria, return to work obligations, and broadened criminal offences with respect to discrimination as well as the new civil right for workers to seek compensation for discrimination
- Amend processes to determine medical expenses and s.93CD claims within 28 days and determine weekly payments claims without medical certification
- Increase estimates to include the uplifts in s.98C, weekly benefits entitlements, the payment of conciliation costs, and reports obtained by the ACCS

## What Self Insurers will need to do (cont)

- Amend processes to provide for overtime for 26 weeks, uplift to 80% PIAWE, and 9% super after 52 weeks
- Develop and publish claims manuals
- Develop processes and documents seeking relevant information from Claimants who apply for conciliation and providing relevant information to Claimants, taking care to exclude irrelevant and privileged information
- Develop a different approach to Medical Panels so that issues of disputed fact or law are not referred, or if referred by the ACCS, that objection is taken
- Comply with the new audit tool

# Questions?