



*Workers Compensation and Injury Management
Bill 2022 (WA)*

Final Bill

Submission to WorkCover Western Australia (WA)

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About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak representative body for the resources sector in Western Australia. CME is funded by member companies responsible for more than 91 per cent of the State's mineral and energy workforce employment,¹ ranging from mining (mineral and petroleum commodities), manufacturing (alumina, basic inorganic chemicals and explosives) and supporting services.

The value of royalties received from the sector totalled over \$11 billion in 2021-22, accounting for 27 per cent of general government revenue.² Amid heightened commodity demand, royalties and stronger tax collections from the sector are expected to underpin government fiscal capacity in 2022-23.

Summary of recommendations

CME appreciates the opportunity to supply technical comment on the *Workers Compensation and Injury Management Bill 2022* (the Final Bill) as part of WorkCover WA's further public consultation from the *Workers Compensation and Injury Management Bill 2021* (the Consultation Draft). A summary of recommendations is included below, with further supporting detail outlined in the following submission.

Consultation

- CME recommends WorkCover WA continue the comprehensive consultation process throughout the development of the accompanying Regulations.

Administrative/ financial burden

- CME supports the retraction of clause 20 in the Final Bill and appreciates WorkCover WA considering the feedback from the previous [2021 Submission](#) (the 2021 Submission).
- CME does not support the Final Bill providing for a claim being taken as accepted if an insurer has not provided a liability decision notice by the deemed liability acceptance day and appreciates WorkCover WA's commitment to further consulting in this area during the development of the Regulations.
- CME is concerned an overly broad definition of 'earnings' could create a disincentive to return to work and recommends the definition of 'earnings' is further refined to remove discretionary bonuses.
- CME is concerned with the removal of 'counselling action' as a reasonable administrative action in the Final Bill and recommends that WorkCover WA revert to the scope provided in the Consultation Draft.

Medical Examinations

- CME appreciates the revised approach which clarifies employer attendance at medical examinations with employee consent will continue to be permitted.

Definition of a worker

- CME does not support the updated definition of 'worker' in the Final Bill and considers the inclusion of implied and oral contracts could present unintended consequences. CME recommends the validation of an individual's employment status as part of the workers compensation process.

Regulations

- CME welcomes the opportunity to engage in further consultation on the proposed framework and development of supporting regulations with WorkCover WA.

¹ Government of Western Australia, [2021-22 Economic indicators resources data](#), onsite employment under State legislation, Department of Mines, Industry Regulation and Safety, 5 October 2022.

² Government of Western Australia, [2021-22 Annual report on State finances](#), Department of Treasury, 28 September 2022, pp. 8.

Context

Ensuring the health and safety of people working in the resources sector is the number one priority for CME and our member companies and while preventing workplace accidents is crucial, it is also imperative that a fair and effective worker's compensation system be in place.

As communicated throughout the consultation process, CME supports the principle of modernisation of the *Workers Compensation and Injury Management Act 1981* (the Act), provided unnecessary prescription and administrative burdens is avoided. Many revisions in the Final Bill may enhance the efficiency of the workers compensation system and CME believes these are positive changes that will help both workers and employers manage claims while also promoting a successful return to work strategy.

It is understood that the focus of the current phase of consultation is to seek technical commentary on the proposed amendments to point out errors, omissions, or potential unexpected consequences, and is not intended to discuss alternative policy perspectives. The following submission is largely focused on providing this technical feedback; however, we have taken the opportunity to reiterate policy positions where CME members feel there is a risk of unintended impacts such as proposals relating to certificates of capacity, audiometric testing and prescribed diseases as outlined below.

Consultation

To date, the consultation process conducted by WorkCover WA has been comprehensive. Consultation for the Final Bill has included:

- **Stakeholder briefings:** WorkCover WA met with CME and member representatives to clarify certain provisions of the Final Bill and provide feedback (the Stakeholder Briefing).
- **Comparison documents:** An explanatory note provided comparisons of the changes from the Consultation Draft to the Final Bill.
- **Final Bill:** A copy of the Final Bill and version with tracked changes was provided for comment.

The regulator's level of involvement has been seen favourably by the WA resources industry. CME commends WorkCover WA for its efforts to make this consultation process fair and transparent for all parties and encourages a similar process to take place with the development of the accompanying regulations.

CME recommends WorkCover WA continue the comprehensive consultation process throughout the development of the accompanying regulations.

Administrative/Financial burden

CME has previously advocated for the removal of unnecessary administrative burdens, including the financial burden associated with an increase in the step-down period, medical and health expenses cap and miscellaneous expenses. CME's 2021 Submission provides further context on CME's positions on these issues and we request that it be read in conjunction with the technical comments provided below.

1. Notice of injury

The Consultation Draft provided that an employer must inform the worker in the approved form that they may have a right to compensation for an injury within 14 days of becoming aware that a worker may have suffered an injury from employment.³ As noted in our 2021 Submission, CME was concerned that this clause would present unintended consequences by disincentivising reporting and presenting additional onus to employers and CME appreciates its retraction in the Final Bill.

CME supports the retraction of clause 20 in the Final Bill and appreciates WorkCover WA considering CME's feedback from the 2021 Submission.

2. Responding to claims

The Final Bill provides that insurers and self-insurers must reply to a workers compensation claim within 14 days of receiving it.⁴ An insurer or self-insurer must then respond with a liability decision or a deferred

³ cl. 20, Workers Compensation and Injury Management Bill 2022

⁴ cl. 28, Workers Compensation and Injury Management Bill 2022

decision notice. In the absence of a decision, the claim is assumed accepted, and the employer will be required to pay the employee's compensation. The insurer or self-insurer must start making provisional payments to the worker before the day specified by the Regulations, which is known as *deemed liability acceptance day*.

If liability is not clear, it is CME's opinion that the acceptance of a claim should not be assumed as it may subsequently increase the financial burden on employers. CME notes that it could be challenging to determine, with rigour, the validity of a claim within this timeframe. Particularly noting that in some circumstances there is a minimum 3 months waiting period for an Independent Medical Examination (IME), which many insurers rely upon to determine medical causation and connection to employment, particularly where mechanisms of injury severity is incongruent or where pre-existing conditions are involved.

We understand that this provision is intended to provide the impacted worker with financial support as soon as possible. However, noting the stated purpose of the Final Bill is to ensure fair and just outcomes, CME considers that further consultation is needed in this area.

CME does not support the Final Bill providing for a claim being taken as accepted if an insurer has not provided a liability decision notice by the deemed liability acceptance day and appreciates WorkCover WA's stated intention to further consulting in this area during the development of the Regulations.

3. Definition of earnings

Income compensation is the amount of money paid to employees on workers compensation which includes board and lodging, bonuses or allowances and earnings of a worker ('earnings'). The definition of "earnings" is clarified in clause 45 of the Final Bill to include all factors that go into determining a worker's pre-injury average weekly rate of pay which include wages, commission, discretionary bonuses and overtime.⁵ This can include bonuses based on company or employee performance.

The wording of this clause requires all bonus payments in the previous 12 months to be considered as part of the worker's compensation wage calculation which may result in workers receiving larger weekly income compensation than their normal wage. CME is concerned that this could undermine the overall intent of the workers compensation scheme to promote a timely and efficient return to work pathway, noting it could provide an increased financial incentive to remain off work. For example, if a worker's weekly salary of \$1800 is lower than their weekly income compensation of \$2000, due to a discretionary bonus based on the annual performance of their employer, they may be disincentivised to return to work.

Whilst the intent and need for a clear and simple definition is appreciated, the CME recommends the definition be refined to remove discretionary bonuses to allow for the weekly income compensation to accurately reflect the normal wage of a worker.

CME is concerned an overly broad definition of 'earnings' could create a disincentive to return to work and recommends the definition of 'earnings' is further refined to remove discretionary bonuses.

4. Reasonable administrative action

Employers may be required to manage the performance or conduct of workers at work. This may require an employer to take administrative action if a worker is not fulfilling the requirements of a role. The Consultation Draft provided that reasonable administrative action includes justified feedback that is carried out reasonably, including the appraisal of a worker's performance, suspension or disciplinary action. If a psychological injury is the primary effect of justified reasonable administration action, it is not an injury from employment. This would mean that if an employer's management of a worker's performance has a negative impact on the psychological health of the worker, they would not be able to claim compensation. CME provided support for this change in the 2021 Submission, as it allowed employers to appropriately manage workplace behaviours and worker performance.

The Final Bill provides that reasonable administrative action will no longer apply to any counselling measures and will no longer apply to any informal disciplinary actions taken by a worker's employer.⁶ This raises issues given the elimination of 'counselling action' could unintentionally eliminate legitimately acceptable administrative actions involving informal performance discussions. For instance, in a circumstance where prompt action and responses are required. Additionally, it can be customary for behavioural counselling to be provided after a workplace bullying incident which may create a cross-over between disciplinary action

⁵ cl. 45, Workers Compensation and Injury Management Bill 2022

⁶ cl. 7, Workers Compensation and Injury Management Bill 2022

and counselling action. The removal of 'any counselling action' appears to create a gap for such situations and may unfairly increase an employer's exposure.

CME is concerned with the removal of 'counselling action' as a reasonable administrative action in the Final Bill and recommends that WorkCover WA revert to the scope provided in the Consultation Draft.

Medical examinations

We note the Final Bill actions an election commitment to amend the Act and introduce a prohibition on employers being present at medical examinations.⁷

Noting issues for flexibility, CME previously raised concerns regarding the proposed full prohibition in our submission to the Consultation Draft. We recommended allowing workers to provide consent in situations where they prefer the employer's presence in their medical examinations and clarifying the employer's ability to attend a briefing with the medical practitioner and injured employee immediately following the medical examination.

The Final Bill permitted communication between a worker's employer and the treating medical professional. CME understand this is to protect the worker's privacy and dignity during physical or clinical examination and treatment and may only be facilitated with the worker's consent, as part of an extended consultation.

CME therefore welcome the revised approach noting the Final Bill clarifies and allows employer attendance at medical appointments outside of direct examination and treatment (with the consent of the worker), providing flexibility for the employer and worker.

CME appreciates the revised approach which clarifies employer attendance at medical examinations with employee consent will continue to be permitted.

Definition of worker

The notion of who is considered to be a worker is a central component to the operation of the Act. Industry has previously recommended that WorkCover WA consider aligning the definition of worker with the definition of employee for Pay-As-You-Go (PAYG) withholding under the *Tax Administration Act 1953*. CME was pleased to see this amendment applied in the Consultation Draft and is disappointed that it has since been revised in the Final Bill.

The Final Bill provides that an individual is a worker if they have entered into, or works under, a contract of service with a person, whether the contract is express or implied, oral or written.⁸ This broadens the scope of the workers compensation regime significantly; the inclusion of oral and implied contracts may introduce a rise in claims where legitimacy cannot be proven or validated such as where there is no record of employment. There is a risk this may unfairly increase an employer's risk and exposure for claims, for example, latent onset conditions.

CME does not support the updated definition of 'worker' in the Final Bill and considers the inclusion of implied and oral contracts could present unintended consequences. CME recommend the validation of an individual's employment status as part of the workers compensation process.

Regulations

CME understands a further opportunity for consultation will occur following passage of the Final Bill through the development of the regulations and looks forward to engaging with WorkCover WA as part of this process.

The Final Bill provides for increased use of regulations to manage areas of workers compensation and injury management which were previously covered within the Act. The rationale provided for extending the regulatory package is that it will provide increased flexibility for the government to quickly respond to unforeseen issues. For example, as part of the response to the COVID-19 pandemic, the *Workers Compensation and Injury Management Amendment (COVID-19 Response) Act 2020* (the COVID-19 Response Act) and supporting amendment regulations commenced on 12 October 2020. The COVID-19 Response Act introduced presumptive workers compensation laws to support healthcare workers who had contracted COVID-19. CME appreciates increased flexibility is intended to allow the government to respond nimbly to a changing environment; however, cautions against the use of the COVID-19 pandemic in setting

⁷ cl. 171, Workers Compensation and Injury Management Bill 2022

⁸ cl. 5, Workers Compensation and Injury Management Bill 2022

a precedence for our future workers compensation regime. COVID-19 required immediate action by leaders, with little time to consider the long-term implications.

There are a number of clauses in the Final Bill that allow for regulations to provide additional details, dates, or scope. While there is a benefit in this providing the opportunity for the regime to be adjusted to meet improvements in technology or changes to the work environment, the significant number of clauses that are linked to regulation introduces the risk of a volatile workers compensation regime. This is in conflict with one of the key reasons for updating the regime, that being to create a less confusing and fragmented environment.

As previously indicated, and summarised below, CME members are concerned that the treatment of some matters within the regulations may increase the risk of a reactive, yet unstable, workers compensation regime. CME has previously provided example areas of concern in our 2021 Submission, including:

- **Prescribed diseases:** Moving prescribed diseases to regulations is a significant deviation from the Act, where specified industrial diseases are currently listed within the Act under Schedule 3. CME is concerned with the rigour involved to meet the prescribed disease inclusion criteria and recommends a stringent process based on the justification, evidence, and cost impact be taken into consideration within a government framework.
- **Certificate of capacity:** The Final Bill provides that a certificate of capacity must be issued by the worker's treating medical practitioner or another health professional who is permitted under the regulations to issue the certificate.⁹ This differs to the Act where a certificate of capacity may only be issued by a medical practitioner. This is of concern to CME members as expanding the scope of who may issue a certificate of capacity may lead to unintended consequences. For example, although some health professionals assist in the treatment of workers, they may lack the essential education, training and qualification to address the full scope of the injury.

CME appreciates the intent of this change is to increase flexibility, availability and accessibility to initial treatment in remote areas where there is limited access to a medical practitioner. It was also noted that a return-to-work certificate of capacity can only be signed by a medical practitioner. CME looks forward to contributing further to this discussion during consultation on the draft regulations. While appreciating there are areas where flexibility is advantageous to accommodate change, CME consider matters such as prescribed diseases and certificates of capacity would be best maintained within the Final Bill rather than detailed in supporting regulations to ensure a Workers Compensation Framework which is stable and provides certainty.

- **Audiometric testing:** Clause 114 of the Final Bill notes that the regulations may make provisions for or concerning the testing for and assessment of hearing loss in workers and the compulsory testing and monitoring for hearing loss in workers.¹⁰ CME has previously raised concerns about the risk of unnecessary duplication between WorkCover WA and the Department of Mines, Industry Regulation and Safety (DMIRS).

It is understood that baseline audiometric testing is a requirement for prescribed workplaces under the Act, however, the WA resources sector also have legal requirements under the *Work Health and Safety Act 2020* (WHS Act) and *Work Health and Safety (Mines) Regulations 2022*. Additionally, a Code of practice was developed for managing noise and preventing hearing loss at work under section 274 of the WHS Act.¹¹

CME understands the development of the regulations will include industry consultation surrounding audiometric testing with consideration to the prevention of duplication and looks forward to participating in these discussions.

CME welcomes the opportunity to engage in further consultation on the proposed framework and development of supporting regulations with WorkCover WA.

5. Conclusion

CME welcomes WorkCover WA's open and transparent consultation and looks forward to ongoing engagement. As previously indicated, the modernisation of the Final Bill has many positive changes which benefit all interested parties. However, the introduced provisions may necessitate more consultation since they run the risk of complicating the system and defeating the purpose of the Act's modernisation. CME will

⁹ cl. 169, Workers Compensation and Injury Management Bill 2022

¹⁰ cl. 114, Workers Compensation and Injury Management Bill 2022

¹¹ cl. 274, Work Health and Safety Act 2020

continue to engage with WorkCover WA to provide feedback and to offer assistance while the accompanying Regulations are being developed.

If you have any further queries regarding the above matters, please contact Naomi Plummer, Policy Advisor – Health, Safety and People, on 0439843968 or N.Plummer@cmewa.com.

Authorised by	Position	Date	Signed
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