Submission No 2

INQUIRY INTO WORKERS COMPENSATION AMENDMENT BILL 2021

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BCA
Business Council of Australia

Workers Compensation Amendment Bill 2021 (NSW)

Submission to the Legislative Council Portfolio Committee No 1 – Premier and Finance

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Overview

This is the submission of the Business Council of Australia to the inquiry of the New South Wales Legislative Council Portfolio Committee No 1 – Premier and Finance into the *Workers Compensation Amendment Bill 2021* (the Bill).

The Bill will repeal amendments that were made to the *Workers Compensation Act 1987* (the Act) under emergency COVID-19 legislation passed by the New South Wales Parliament in May 2020. The amendments introduced a new section 19B to the Act, under which COVID-19 is a 'deemed disease' for workers compensation purposes. Any worker who contracts the virus is automatically deemed to have done so in the course of their employment, which triggers an entitlement to workers compensation. Where an employer wishes to dispute this deemed liability, the onus is on them to prove that the worker acquired the virus elsewhere.

Whilst the reasons for the amendments during the initial COVID-19 lockdown were understandable, with the passage of time we now have more understanding of the virus. We now know that there is no evidence to suggest that most individuals are more likely to contract the virus in their workplace than elsewhere. As the level of contact tracing is reduced, it will become impossible for employers to prove where an individual contracted the virus.

The future impact of the amendments is likely to be significant. Most employers will bear the cost through higher workers compensation insurance premiums. Other businesses that self-insure will be required to bear the entire cost of the compensation payments in all cases. Other businesses are insured through private arrangements, which may no longer have sufficient liquidity to remain viable given the anticipated increase in claims, which is likely to be in the order of 25%. In such circumstances, these businesses will have no option but to revert to the state-funded system, in which case the cost is borne by NSW taxpayers. For many businesses, particularly smaller ones, the costs will also flow through to higher prices for customers.

The BCA strongly supports the Bill and recommends its passage by the Legislative Council as soon as possible.

The urgent need for the Bill

The 2020 amendments to the Act were passed early in the pandemic, where the community was largely in lockdown, but those workers who were required to attend workplaces did so because of the essential service nature of their work. These workers were seen to face greater risks than others (especially without an available vaccine), and were therefore granted additional protections to claim workers compensation if they contracted COVID-19. Given that the rest of the community was largely shut down, there was a much smaller chance these workers would contract the virus outside of work. There are currently no restrictions on travel within New South Wales, which means that the likelihood of a person contracting COVID-19 outside their workplace is inordinately greater than during the initial 2020 lockdown, when workers could only travel between their home and their workplace and almost nowhere else.

The amendments were introduced by the Greens Party into the Legislative Council and supported by other non-Government parties. They were then not opposed by the Government and were passed in the context of a range of emergency measures that formed the omnibus *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020*.

The amendments were introduced to the Upper House in the evening of 12 May 2020 during debate on the omnibus Bill and were passed by the Lower House the next morning on 13 May. As such, they were not subject to the usual process of Government or Parliamentary scrutiny that would usually apply to such far-reaching legislation.

Workers Compensation laws in the various Australian jurisdictions include a small number of 'presumptive conditions' or 'deemed diseases', for which the legislation imposes a presumption that the disease was

contracted in the workplace. These presumptions have been enacted where there is a clear history of workers contracting particular diseases in certain workplace environments and where there is incontrovertible medical evidence that such workplaces carry a higher risk of those diseases. For example, the Act includes presumptive provisions for certain cancers known to be more prevalent amongst firefighters.[1]

Unlike other presumptive conditions under workers compensation laws, we are not aware of any scientific evidence to suggest that people are generally more likely to contract COVID-19 at work, or that workplaces are innately more conducive to its spread. We also note that similar amendments have not been made in any other Australian state or territory.

Enough time has now elapsed to accurately assess the 2020 amendments. With vaccination at high levels and borders progressively reopening, it is widely accepted that COVID-19 may circulate more broadly in the community in future. With more workers returning to their workplace, and not being subject to any movement limitations outside of their workplace, the rationale for the 2020 amendments is no longer valid.

Presumptive provisions are no longer appropriate

When considered in the current environment of high vaccination rates and unlimited movement within New South Wales, the 2020 amendments become untenable.

The amendments are extremely far-reaching. First, they capture a wide range of workplaces, including all workplaces in the Retail, Hospitality and Construction sections. The full list of industries is included as an Attachment to this submission.

Second, they apply to an inordinately wide range of workers within the workplace. Even a casual employee who has worked as little as one day in the previous 21 days is deemed to have contracted the virus at work.

In all such cases, the worker is deemed to have contracted the virus in the course of their employment. The onus is then on their employer to prove otherwise, even when the workplace is not an exposure site. Even if the employee is proven to have visited an exposure site that is not their workplace, the Act will still deem them to have caught the virus at work.

Most large workplaces are now controlled environments with multiple measures in place, such as check-ins and sanitising. A typical supermarket, distribution centre or building site will have more control measures than the outside environment, which means that, *prima facie*, employees are less likely to contract the virus at work than elsewhere.

There are a range of other reasons why the 2020 amendments are no longer appropriate:

1. Even where there is no evidence of COVID-19 being present in a workplace, establishing that a worker contracted COVID-19 outside of the workplace is inherently difficult, given that the various strains of COVID-19 can be transmitted through objects, airborne, and from contact with any other person.
2. The NSW Department of Health has indicated that it is not able to share contact tracing or other related data with employers, which makes tracing the source of infection near impossible for any employer.
3. The level of contact tracing is also being wound down, which would make it extremely difficult even for the Department of Health to confirm an infection source, in the event that an employer sought its assistance to do so.
4. Workers are not required to share information with their employers in relation to their attendance at other places outside work (including exposure sites) and employers cannot compel them to do so.
5. With the overwhelming majority of the workforce now vaccinated, those who have chosen to receive a vaccination are at a significantly reduced risk of contracting the virus. Those who have chosen not to

[1] Section 19A; Schedule 4

vaccinate have assumed a higher level of personal risk for themselves. It is not appropriate for this risk to be moved onto their employer, given the conscious choice they have made.

Presumptive provisions are no longer workable

The 2020 amendments have now been in place for over 18 months. We now have enough evidence to show how they have worked so far and how they will become increasingly unworkable in future.

If the 2020 amendments are not repealed, the impact on business will grow over time. Most employers will bear the cost through higher workers compensation premiums. This could mean the difference between re-opening for longer hours or employing an additional staff member. In many cases the costs will also flow through to higher prices for customers.

The businesses that will be most impacted will be small and family businesses. As well as the additional costs, they will have the stigma of being deemed to have transmitted the virus at their place of business, regardless of whether they actually did. For smaller retail or hospitality outlets currently struggling to get back on their feet, being deemed to be an exposure site in this way could be devastating for them.

In addition. the impact of the 2020 amendments is already being felt in other ways:

1. Tight time frames for managing workers compensation claims in New South Wales require an employer must make an initial liability decision within 7 days, which means in most cases the ability to trace the source of contraction is impossible.
2. The median incubation period for COVID-19 is between 4.9 to 7 days before an individual is symptomatic, with a range of 1 to 14 days.[2] This uncertainty adds to the difficulty in tracing the time and place of contraction. It also illustrates that the 21-day eligibility timeframe is not appropriate.
3. Creating a workers compensation claim for each COVID-19 contraction in New South Wales is administratively burdensome and will require an increasing diversion of resources, which will be most keenly felt by smaller businesses.
4. For national employers. the way in which workers compensation matters are managed in New South Wales is now vastly different to the rest of Australia. New South Wales now has a unique and burdensome strain of red tape that is not found anywhere else.
5. The possible longer-term impacts of "long-COVID" are still largely unknown. This uncertainty is now placing significant financial pressure on insurers, to the extent that some may no longer remain viable, given the open-ended nature of their potential liabilities.

New South Wales is out of step with the rest of Australia

It is important to note that New South Wales is the only Australian jurisdiction to have introduced such broad presumptive legislation.

The only other jurisdiction to have enacted COVID-19 presumptive legislation of any kind is Western Australia.[3] However, this legislation is limited to *"health professionals"* only.[4]

In addition, the WA legislation provides that prescribed workplaces are set by Regulation, rather than enshrined in legislation, in recognition that the risk of contracting COVID-19 in certain workplaces would be uncertain and likely to change over time.

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[2] https://aci.health.nsw.gov.au/covid-19/critical-intelligence-unit/covid-19-transmission-flowchart
[3] *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020* (WA)
[4] Clause 67, *Workers Compensation and Injury Management Regulations 1982* (WA)

The rationale for the West Australian Government to introduce this presumption was that *"Healthcare workers, and particularly those in hospital settings, are clearly at a heightened risk of contracting COVID-19, given their proximity to people with the disease."*[5] This rationale was not applied to any other class of workers.

The WA Government is the only government in any Australian jurisdiction to have adopted such a policy in relation to any workplaces. We note that notwithstanding the passage of the presumptive provisions by the New South Wales Parliament, they have never been the policy of the New South Wales Government.

Protections for workers will remain

A number of false claims have been made about the Bill. It will not remove workers compensation protection for workers. Anyone who does contract the virus at work will still be eligible for compensation. The normal processes under the Act will apply, rather than the presumptive provisions. The Bill will treat COVID-19 the same as other conditions and bring New South Wales into line with other states.

Businesses in New South Wales face many challenges at present as they re-open and help the community return to life-as-normal as much as possible. New South Wales has led Australia in both coping with COVID-19 and leading the way on recovery. The last thing that New South Wales businesses need is to be unfairly burdened with the cost and stigma of additional legal liabilities when they are not at fault.

BUSINESS COUNCIL OF AUSTRALIA

42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au

[5] Second Reading Speech, *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Bill 2020* (WA), 11 August 2020

Attachment – Prescribed industries covered by the 2020 COVID-19 presumptive provisions

(a) the retail industry (other than businesses providing only on-line retail),

(b) the health care sector, including ambulance officers and public health employees,

(c) disability and aged care facilities,

(d) educational institutions, including pre-schools, schools and tertiary institutions (other than establishments providing only on-line teaching services),

(e) police and emergency services (including fire brigades and rural fire services),

(f) refuges, halfway houses and homeless shelters,

(g) passenger transport services,

(h) libraries,

(i) courts and tribunals,

(j) correctional centres and detention centres,

(k) restaurants, clubs and hotels,

(l) the construction industry,

(m) places of public entertainment or instruction (including cinemas, museums, galleries, cultural institutions and casinos),

(n) the cleaning industry,

(o) any other type of employment prescribed by the regulations for the purposes of this definition.