



Tasmanian Unions

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Submission to the WorkCover Tasmania Board

Review of Section 87 of the *Workers Rehabilitation and Compensation Act 1988 (Tas)*

18 April 2019

Introduction

Unions Tasmania is the peak body for trade unions in Tasmania. With 25 affiliate unions, we represent approximately 50,000 members across all industries, in both the public and private sector. Unions Tasmania is also the local branch of the Australian Council of Trade Unions (ACTU).

The Tasmanian trade union movement works everyday towards building a better society for everyone. We do this by ensuring workers have, at a minimum, fair pay, decent jobs, rights at work and a safe workplace. Above all else, the safety of working people is the core business of the union movement. Our interest and advocacy extends to workers when they have been injured at work.

Unions play a key role in assisting workers to navigate an often adversarial and unfamiliar workers rehabilitation and compensation system. For union members, and indeed for a number of non-union members, a union is often the first port of call for assistance with their workplace injury and subsequent claim. As a result, we are acutely aware of the negative effects on older workers when payments cease at age pension age. It is for these reasons that we make this submission.

We are pleased to provide this submission addressing the issues and options as identified in the Issues Paper issued by the WorkCover Tasmania Board.

The operation of section 87 and it's impact on older workers

Unions Tasmania has never supported aged based restrictions on the receipt of weekly workers compensation payments. We submit that section 87 of the *Workers Rehabilitation and Compensation Act 1988 (Tas)* ('the Act') discriminates against mature workers on the basis of their age. We understand other organisations who also advocate for equality and for older workers share this view. As a movement underpinned by principles of fairness and equity, limiting the payment of workers compensation to workers based on their age is a position we cannot support.

Employers have a duty of care to provide a safe workplace for their employees. The payment of workers compensation ensures that workers are not financially disadvantaged as a result of injuries that occur in connection with their job. The community rightly expects that, where employers have failed to provide safe workplaces or where work has contributed to or caused an illness or injury, that the employer (in practice through their insurer) bears the cost. Section 87 unfairly burdens a worker with the cost of a workplace injury.

Unions Tasmania submits that Section 87 is inconsistent with the Objects of the Act contained in Part 2A, in particular 2A(b) and (f) which establishes a rehabilitation and compensation scheme that provides fair and appropriate compensation to workers and dependents for workplace injuries and that is fair, affordable, efficient and effective. We submit that Section 87 operates to ensure that workers aged 67 years and over do not receive appropriate compensation and that this is neither a fair nor effective system for them.

The operation of Section 87 impacts on workers in the following ways.

Financial hardship

Section 87 causes immediate financial hardship for many workers, particularly those unaware of its operation. Workers may receive no notification that their weekly payments will cease and the first they find out about it is when payment they were expecting does not hit their bank account. They are then without an income and forced to seek costly legal advice and representation if they are to challenge the operation of Section 87.

Not all workers nearing age pension age have paid their mortgages (if they are fortunate enough to own a home) or are financially ready for retirement. Parents are increasingly supporting their adult children to remain at home for longer than in decades past. The increasing casualisation of jobs means young workers rely on parents for accommodation, food and support because insecure work makes it difficult to rent or buy property. This creates additional pressures for older workers.

For the older worker who has no intention of retiring at 67 years and has not financially planned for the loss of wages, the cessation of weekly payments can be financially devastating at a time when they are already likely dealing with the effects of serious illness or injury caused by work.

Lack of dignity leading into retirement

Section 87 ensures an abrupt and immediate end to weekly compensation payments and, in our experience, this is unexpected for workers who are broadly unaware of the provision and are shocked when their payments cease. They experience a range of negative reactions including feeling confused, devalued and discarded by their employer especially where they have had a long and continuing employment relationship. It is hardly the dignified start to retirement that an older worker deserves.

Pressure to settle

The operation of Section 87 means that workers who have knowledge of the cessation of weekly payments at age pension age may feel pressured into reluctantly settling their claim before they reach 67 years. Their bargaining position is also weakened when negotiating a settlement, the closer a worker gets to age pension age.

The worker settles not because it is in their best financial interests but because they have the threat of weekly payment cessation hanging over them.

Mature age workforce participation

The current Act not only operates to significantly impact workers in receipt of workers compensation entitlements, it also operates as a bar to continued workforce participation by mature workers. Unions Tasmania affiliates report that some employers will tell their mature workers that they will no longer be entitled to workers compensation once they reach age pension age. This acts as a considerable disincentive for workers to continue in the workforce and puts them in a difficult position of continuing work with the knowledge that they no longer have workers compensation coverage.

Case study

A Unions Tasmania affiliate recently assisted a school cleaner who was sent a letter by the Department of Education stating her workers compensation payments would cease, as in accordance with the Act, she was no longer eligible. The letter did not outline any rights to redress for the worker. The union confirmed with the Department that this was a standard letter issued to workers approaching age pension age with a workers compensation claim.

This caused immediate distress as she was suffering from a painful physical injury and was not in a position to return to work. She was living from pay to pay.

Had this worker not been a member of her union and sought their advice, she would not have been made aware that she had a right to make an application to the Tribunal. An estimate of costs was provided by the firm to the union. For the taking of instructions, preparation of documents and attendance at hearing, the estimated legal bill was going to be between \$7,500 and \$10,000. Fortunately for this worker, her union had a partnership with the firm that allowed them to pursue her case at no cost. This is not an option available to most workers.

Thankfully, a determination to continue weekly payments of compensation was made two months after she received the notification. It was a stressful, time consuming and uncertain two months that she should not have had to suffer.

Why the age restriction needs to be removed

Unions Tasmania submits that there are limited circumstances upon which workers should have different entitlements at law. We have stated our position that Section 87 is inherently unfair and discriminates on the basis of age. We further submit that older Tasmanians make valuable contributions to Tasmanian workplaces well beyond age pension age and that, with increasing life expectancy, Section 87 should be removed to ensure that all workers are covered as the age demographic of our workforce changes.

Older Tasmanians make valuable contributions to the workplace

Community attitudes to older workers, and to older people in general, are changing. We recognise the value of their contribution in all areas of society, including the workplace. We want diverse workplaces and older employees hold valuable corporate knowledge, experience and leadership skills. They are an essential part of the modern workplace. We should encourage their contributions and their continued engagement.

Our idea of a 'retirement' age is changing

For previous generations, 60 or 65 years of age depending upon gender, were considered traditional 'retiring' ages. Unions Tasmania argues that a commonly agreed 'retirement' age no longer exists. The Commonwealth age pension age doesn't reflect the community's view of a retirement age and has been subject to much political change in recent years. Proposals to raise the pension age to 70 years were supported and then abandoned following community backlash.

Unions Tasmania supports workers having a dignified retirement. We further support all policy efforts to grow worker's wages and subsequent retirement incomes to ensure that workers are not forced to miss out on enjoying their retirement after a life of paid labour. We do, however, recognise that a number of factors combine to influence when a worker retires and, for many, that age will be older than in years past.

Working longer by choice or out of necessity?

Older workers may retire from their career or full-time employment and have a break in employment only to discover they still wish to continue making contributions in paid employment. Work provides both intellectual and social stimulation and older workers find they miss one or both of these in retirement. They may return to former or new workplaces, sometimes in a part time capacity, and do so for a number of years. They deserve to be covered by our legislation.

Unions Tasmania also makes the important point that working past retirement age is not always a genuine choice. Financial pressure means older workers continue to work past age pension age out of necessity.

There is still a generation of workers who have not had superannuation long enough to provide for a decent standard of living in retirement. For workers who have worked in low paid industries or, in particular for women, whose working lives have been disrupted by caring responsibilities and whose superannuation balances have correspondingly suffered, they work into retirement because they have to, not because they want to. They should not be further penalised in their employment by the restriction of workers compensation past age pension age.

Life expectancy is increasing

Australians, and Tasmanians, are living longer. Life expectancy at birth has continued to rise steadily in Australia. In 2016, the life expectancy at birth was 80.4 years for males and 84.6 years for females.¹ This is markedly different from the 1960s where men were expected to live until 67.9 years and women to 74.2 years. That means there is more than a decade, nearly two, currently between the age pension age and average life expectancy.

It is not unforeseeable or unreasonable to presume that older workers may have the desire or capacity to continue in paid employment past 67 years.

Not all workers are entitled to the age pension

The age restriction operates in a way that presumes workers will not be entirely financially disadvantaged upon cessation of weekly payments because they will be entitled to the age pension instead. There are a few problems with the presumption.

¹ Australian Institute of Health and Welfare 2018. Australia's health 2018. Australia's health series no. 16. AUS 221. Canberra: AIHW.

The first is clearly that not all workers are entitled to the age pension. They may have a partner who receives income that either reduces or precludes their entitlement. They may also have to serve waiting periods or have their payment reduced if they received leave or other payments upon retirement. It is by no means automatic that a worker retiring will be eligible for the age pension.

Secondly, there will be significant financial hardship for a worker whose compensation payments are ceased to then be supported by the Age Pension. The full rate of weekly age pension for a single person is currently very low at \$843.60 a fortnight or \$635.90 for a member of a couple. This is significantly less than what a worker would be receiving in paid employment, even at the legal minimum wage of \$719.20 per week. Workers compensation payments, even with step downs, will be more than the age pension.

What the data tells us

The Issues Paper provides data that weekly payments for persons over 65 years remain at less than 1% of total weekly workers compensation payments in Tasmania. The current cost to the scheme from older workers can therefore be categorised as minimal. However, the data also tells us that from 2012 to 2018 there has been an increase in injuries to workers aged over 65 years.

Unions Tasmania submits that this evidence supports the need for removing the age restriction. It demonstrates a slowly growing number of injuries to workers over 65 years that will see a larger group each year miss out on entitlement to compensation under Section 87. The costs will have to be picked up elsewhere by the taxpayer either through our public health system or through receipt of Centrelink payments rather than the employer/insurer.

Potential options for change

Unions Tasmania submits that the operation of Section 87 fails older workers. While the option exists for workers to make an application to the Tribunal to extend weekly payments, in reality this provision is largely unknown to workers and unfeasible to access if it is known. As the Issues Paper outlines, only 2 to 10 claims per annum have been made to the Tribunal over the last four years, demonstrating its underutilization.

Furthermore, the operation of Section 87 puts a burden of proof on to a worker to provide evidence that would satisfy a Tribunal that they intended to work past retirement age. This is out of step with industrial legislation as there is no obligation on workers under other industrial laws to make any positive declarations to the employer of continuing employment. It is presumed workers intend to continue working unless otherwise stated. Workers notify employers when they intend to leave the workplace, not when they're just continuing to work as normal.

The evidence required by a worker to demonstrate that they would continue working is more difficult to obtain or prove than if the worker had shown an intention to retire. An intention to retire would usually be demonstrated by notification to an employer. An intention to continue working is more complex and would most likely rely on a worker's own statement regarding their state of mind. A worker may have had every intention of continuing working but does not want to risk the legal costs in pursuing an application under s.87 where they have to rely solely on their own statement.

There is no general compulsory retirement age in Australia. There are some very limited exceptions relating to Australian Defence Force personnel, police and magistrates that compel retirement between 60 and 70 years of age depending upon the occupation. The words in Section 87(2) that refer to 'the terms and conditions of a worker's employment are such that permit him or her to continue in that employment beyond age pension age' indicate that there exists some

requirement that a worker's terms and conditions stipulate retirement age. This is not the case in Australia and these words need removing.

Unions Tasmania submits an option that was not outlined in the Issues Paper. We submit that the Act should ensure equity of access to workers compensation weekly payments of up to 9 years for all workers regardless of age but that there be an option for employers to apply to the Tribunal to cease payments upon attaining age pension age. Our recommendation is outlined below.

Recommendation

Unions Tasmania recommends that the entitlement to weekly compensation payments is to continue once a worker attains age pension age.

Once a worker reaches this age, the employer may make an application to the Tribunal for a determination that the entitlement to weekly payments cease. The Tribunal may make a determination that the entitlement ceases where it can be satisfied that prior to the injury occurring, the employee had no intention of continuing employment beyond that age.