

consequence, potentially lead to significant unfunded claims liabilities for the WorkCover scheme.

To this end, the bill before the house today refines the Accident Compensation Act 1985 to:

ensure that the Victorian WorkCover Authority can enforce compliance with all obligations by employers swapping from the Victorian scheme to the Comcare scheme;

remove any uncertainty about provisions relating to the necessary financial guarantees that must be provided by those companies; and

remove a discretion that existing self-insurers have in relation to tail claims, and mandate that they hand back the management of such claims to the Victorian WorkCover Authority, should they self-insure with Comcare.

This bill is about fiscal and social responsibility. It is about certainty for Victorian employers and workers and it is in the best interests of our state.

At the time the 2005 provisions were introduced, the Victorian WorkCover Authority's enforcement powers did not extend to penalising those large employers who swapped schemes in situations where they failed to meet their legislative obligations.

This created an inevitable incentive for those employers to not meet those obligations.

Similarly, the 2005 provisions required those employers exiting the Victorian scheme to provide financial guarantees with an authorised deposit-taking institution in respect of insolvency and claims deterioration, and the circumstances in which that guarantee could be recovered.

There have been some concerns raised about the clarity and enforceability of these obligations. It is therefore incumbent on the government to act in this area to ensure that those exiting the Victorian scheme do not do so to the detriment of other Victorian employers. This bill clarifies those obligations and puts in place penalties for non-compliance.

Finally, clarification is required around the tail-claim obligations of large employers exiting the Victorian scheme. At the time of the 2005 amendments, it was the intention to ensure that the existing claims of large employers at the time of transfer would remain within the Victorian system, so that appropriate safeguards for injured workers remained.

However, as the current legislation stands, there is nothing to prevent large companies exiting the Victorian scheme from retaining management of their tail claims, effectively preventing the WorkCover Authority from ensuring such claims are managed appropriately and in the interests of injured workers.

The amendments in the bill before the house seek to ensure that such a situation does not eventuate.

It is imperative that these fundamental changes be made to protect the nation's best-performing statutory workers compensation scheme and the workers and employers for which it was established.

This is a simple and straightforward matter of protecting Victorian interests — the interests of our workers, the interests of our employers and the interests of our WorkCover scheme.

I commend this bill to the house.

Debate adjourned on motion of Mr CLARK (Box Hill).

Debate adjourned until Wednesday, 6 June.

SUPERANNUATION LEGISLATION AMENDMENT (CONTRIBUTION SPLITTING AND OTHER MATTERS) BILL

Statement of compatibility

Mr HOLDING (Minister for Finance, WorkCover and the Transport Accident Commission) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In accordance with section 28 of the Charter of Human Rights and Responsibilities, I make this statement of compatibility with respect to the Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007 (the bill).

In my opinion, the bill, as introduced to the Legislative Assembly is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

Overview of bill

The bill is intended to facilitate the splitting of superannuation contributions between members of the ESSPLAN scheme and their spouses. The ESSPLAN scheme is a superannuation scheme provided for persons employed in Victorian emergency services under the Emergency Services Superannuation Act 1986 (Vic). The bill will allow the Emergency Services Superannuation Fund to offer contribution splitting to their members. The purpose of permitting contribution splitting is to attract concessional tax benefits to the personal and employer contributions of members through the operation of the Superannuation

Industry (Supervision) Act 1913 (Cth) (the commonwealth act). Members of the ESSPLAN scheme enjoy various concessional tax benefits because the ESSPLAN scheme is a 'complying superannuation fund' under the Commonwealth Act.

The bill adopts the definition of 'spouse' provided for under section 10 of the commonwealth act which is restricted to married or heterosexual partners who live together on a genuine domestic basis as husband or wife. It does not extend to same-sex couples.

Human rights issues

1. *Human rights protected by the charter that are relevant to the bill*

The human right protected by the charter that is relevant to the bill is the right to equal protection of the law without discrimination and to equal and effective protection against discrimination — section 8(3).

2. *Consideration of reasonable limitations — section 7(2)*

As this bill limits or restricts the relevant human right identified in 1. above, the following analysis is provided to demonstrate that the limitation is reasonable and can be demonstrably justified under section 7(2) of the charter.

(a) *The nature of the right being limited*

Section 8(3) of the charter operates to prohibit discrimination in law or in fact in any field regulated by public authorities and requires that the content of any legislation enacted by Parliament not be directly or indirectly discriminatory. 'Discrimination' under the charter is defined to mean discrimination within the meaning of the Equal Opportunity Act 1995 (Vic) on the basis of an attribute set out in section 6 of that act. Section 7 of the Equal Opportunity Act defines 'discrimination' as meaning direct or indirect discrimination on the basis of an attribute. The attributes referred to in section 6 include sexual orientation.

The bill defines 'spouse' as having 'the meaning given by section 10 of the Superannuation Industry (Supervision) Act 1993 of the commonwealth'. Section 10 of the commonwealth act defines 'spouse' as including 'in relation to a person ... another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person'. The definition of 'spouse' in the commonwealth act distinguishes between married and de facto heterosexual couples and relationships involving same-sex partners who live with their partner on a genuine domestic basis. The bill would have the effect that only those in the former category may access superannuation contribution splitting arrangements. The incorporation of the definition of 'spouse' from the commonwealth act into the bill has the effect that the bill directly discriminates against members of the ESSPLAN scheme who have a same-sex partner who lives with the member on a genuine domestic basis on the basis of the attributes of sexual orientation.

(b) *The importance of the purpose of the limitation*

The purpose of the adoption by the bill of the definition of 'spouse' under the commonwealth act is to ensure consistency with the commonwealth act so that the splitting of superannuation benefits between a member and his or her

'spouse' (as defined) will attract the concessional tax benefits which flow from the commonwealth act.

This will ensure that as far as possible ESSPLAN may provide to its members the same benefits which might accrue by virtue of contribution splitting as are available to members of other complying superannuation funds while yet maintaining consistency with the commonwealth act.

(c) *The nature and extent of the limitation*

The bill does not enable contribution splitting between same-sex partners who live with their partner on a genuine domestic basis while facilitating contribution splitting between heterosexual married or de facto couples. Thus, the bill limits or interferes with the right to equal protection of the law without discrimination and to equal and effective protection against discrimination. However, by adopting the definition of 'spouse' in the commonwealth act in order to achieve consistency with the commonwealth act, the extent of the limitation with the relevant right goes so far and no more than is necessary exactly to achieve consistency.

(d) *The relationship between the limitation and its purpose*

It is my opinion that there is a rational and proportionate relationship between the limitation upon the relevant right and the purpose of that limitation. Given the objective of the bill, practical consistency could not here be achieved without the adoption of a definition of 'spouse' which reflected the terms in the commonwealth act. The bill might otherwise be misleading as to its effect and have direct adverse consequences for members with same-sex partners.

The commonwealth act does not recognise the splitting of superannuation contributions between same-sex partners. If the bill adopted a broad definition of 'spouse', which included same-sex partners, any splitting of superannuation contributions between them would not comply with the commonwealth act and would be ineffective for income tax purposes. Any member of the ESSPLAN scheme who split his or her superannuation contributions would be taxed in relation to the ineffective same-sex contribution split as though no split had occurred. That would mean that where the split occurred before the member had retired, the member would be taxed at the member's marginal income tax rate plus Medicare levy rather than at the concessional rates normally applying to superannuation. If this amount was not correctly included in the member's tax return, penalties would apply to any tax shortfall that occurred and a general interest charge would also be payable. In addition, the member would potentially need to find the funds to pay any penalties or interest from his or her own personal finances as the contribution provided to the same-sex partner would be unlikely to be released to the member to assist the payment. It might also be the case that there were adverse tax consequences for the receiving same-sex partner despite the splitting attracting no tax concessions for the member. If the receiving same-sex partner was to transfer the contribution to another fund the problems would be further complicated.

Furthermore, the fund under the ESSPLAN scheme might have PAYG withholding obligations to meet in relation to any same-sex contribution split which occurred (repayment of which might be sought from the member) and that the fund might be exposed to substantial penalties for releasing a superannuation contribution to a same-sex partner under the early release penalty provisions. The fund would need to

disclose in its product disclosure statements that the same-sex contribution splitting would be ineffective for tax concessional purposes, and might lead to adverse tax consequences for the member. There would also be significantly increased complexity in the administration of the fund.

In these circumstances there is a rational connection between the nature and extent of the limitation upon the relevant right and the purpose for which that limitation is imposed. Without the imposition of the limitation the bill would be misleading in its effect and could lead to adverse consequences for members of the ESSPLAN scheme who have same-sex partners and for those partners.

(e) *Any less restrictive means reasonably available to achieve its purpose*

As the extent of the limitation with the relevant right goes so far and no more than is necessary exactly to achieve consistency with the commonwealth act, there is no less restrictive means reasonably available to achieve the purpose of the limitation.

(f) *Any other relevant factors*

An alternative would be for the state not to legislate to facilitate superannuation contribution splitting at any couples. Failing to legislate to provide for contribution splitting for heterosexual married or de facto couples would unnecessarily deprive those members of a potentially valuable benefit.

The proposed legislation defines 'spouse' by cross-referencing with the commonwealth act. Accordingly, should the commonwealth change its definition of 'spouse' to include same-sex couples, the Victorian legislation will automatically give effect to that broader definition.

Conclusion

The bill has the important objective of enabling members of the ESSPLAN scheme to have access to benefits enjoyed by superannuants in other complying funds. It has been prepared in such a manner as to ensure that it achieves a practical consistency with the commonwealth act. The adoption of a definition of 'spouse' that included same-sex partners might mislead those partners into the making of superannuation arrangements that would be ineffective for tax purposes and might result in an immediate tax liability.

I consider that the Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007 is compatible with the Charter of Human Rights and Responsibilities because, although it does limit, restrict or interfere with a human right, being the right to equal protection of the law without discrimination and to equal and effective protection against discrimination under section 8(3) of the charter, that limitation is reasonable and proportionate within the meaning of section 7(2) of the charter.

TIM HOLDING, MP
Minister for Finance, WorkCover and the Transport Accident Commission.

Second reading

Mr HOLDING (Minister for Finance, WorkCover and the Transport Accident Commission) — I move:

That this bill be now read a second time.

The primary purpose of this bill is to provide for superannuation contribution splitting in the ESSPLAN, which is the accumulation plan that sits within the Emergency Services Superannuation Scheme (ESSS). The bill also deals with a range of other miscellaneous superannuation issues.

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The principal amendment in the bill provides for the splitting of personal and employer superannuation contributions between a member of the ESSPLAN and their spouse, at the request of the member. This is consistent with the commonwealth government's contribution-splitting legislation, which took effect from 1 January 2006.

Members of ESSPLAN will be able to split personal and employer contributions with their spouse in respect of contributions made since 1 July 2006. Members may split contributions to an account held by their spouse, either within ESSPLAN or to a different fund within the superannuation system. This will enable spouses to share superannuation benefits and can improve the taxation position of some couples.

Most regrettably, the Victorian government is prevented from extending the opportunity of contribution splitting to same-sex couples. This is due to the relevant commonwealth legislation which, for the purposes of contribution splitting, narrowly restricts the definition of 'spouse' to heterosexual couples who live together on a genuine domestic basis.

This government strongly believes that limiting contribution splitting to heterosexual couples is unfair, discriminatory and typical of the outdated, mean-spirited policies adopted by the Howard government. We also are aware that it does not comply with the principles of Victoria's Charter of Human Rights and Responsibilities. The Victorian government has previously amended its legislation to include a definition of 'domestic couple' that does not discriminate on the basis of sexual orientation. Disappointingly, in respect of contribution splitting, Victoria's hands are tied by the commonwealth government and its discriminatory definition of 'spouse'.

The Victorian government is constrained by the commonwealth's discriminatory legislation for a number of reasons. Firstly, if the Victorian government introduces superannuation legislation that does not mirror the commonwealth's retirement incomes policy, the commonwealth has the ability to remove the exempt public sector superannuation status of the ESSS. This in turn would mean that the ESSS would

