ACTU Submission to the Senate Education & Employment Committee on the Safety, Rehabilitation and Compensation Amendment Bill 2014

30 May 2014

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Introduction

1. The Australian Council of Trade Unions (ACTU) represents nearly two million working Australians and their families. The union movement advocates for safe and decent working conditions for all Australians. Since our establishment in 1927, the ACTU has supported a range of initiatives to improve workplace safety, and we have been active in the ongoing struggle to provide fair compensation to workers who are injured on the job.
2. We are pleased to have this opportunity to provide a submission to the Senate Education and Employment Committee ('the Committee') in regards to proposed amendments to the *Safety, Rehabilitation and Compensation Act 1988* ('the SRC Act').
3. However, we are disappointed with the extremely short time frame provided in which to make submissions to this inquiry. The ACTU has 47 affiliates, all of whom are passionately concerned with workers' health and safety, and for whom support of vulnerable, injured workers is of paramount importance. Having only been given a little over a week to make a submission to this inquiry, it has been difficult to properly consult with our members about the specific issues facing workers compensation in their respective industries. Workplace safety is literally a matter of life and death, and as such, Australian workers deserve better than to have these amendments rushed through with little or no opportunity for broad public consultation.
4. The focus of this submission will be on our concerns in relation to the specific amendments proposed by the *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014* (the Bill). To provide context to the inquiry we will also be providing some broader background information on the Comcare system and processes.
5. Workers injury compensation coverage is a basic right and principle. The ACTU is committed to the Union Charter of Workplace Rights (appended), which specifies that all workers have the right to a fair, just and equitable compensation system in the event of a workplace injury. It is our position that workers injury compensation should be available to all members of the workforce and should cover injuries arising from travel to, from, or during work, including during recess breaks. Workers injury compensation should be available, without exceptions, upon a serious injury resulting in permanent impairment or death of a worker and for any dependents of that worker.
6. We believe that the delivery of benefits should be speedy, efficient and fair. Delayed payment and treatments will result in physical, physiological and financial hardship to injured workers. To avoid unnecessary stress and uncertainty, the claim determination should be conducted in a timely and effective manner with appropriate dispute resolution processes (including access to representation) where claims are rejected. And where companies seek to self-insure, this should not be used to erode workers' rights to obtain lower compensation

entitlements for workers than that which they would otherwise receive under a state or territory jurisdiction. Therefore, whilst we support the establishment of nationally consistent workers injury compensation standards, this should not be at the expense of weakening the strong protections that have been built up over many decades in our states and territories.

7. Whilst we also acknowledge there may be some small cost savings to employers by deregulating the workers injury compensation system, the argument put forth in the Regulation Impact Statement has been overstated, and in several instances, the proposed amendments could in fact add to an employer's regulatory burden, rather than reducing it. Moreover, any minor savings for corporations as a result of these carve outs will come at a high price, particularly for workers in high risk industries or those employed by smaller organisations, and their families, who will be left to bear an even great cost.
8. The burden of poor work health and safety practices is already disproportionately carried by workers and their families. A recent Safe Work Australia report estimated that 95% of the costs of work-related injury and disease were borne by workers and the community, through increased public health costs and social security.[1] The proposed amendments would only serve to further shift the risks of employment away from business and onto vulnerable injured workers, who can least afford it.
9. Finally, there is a strong expectation within the Australian community that workers have a fundamental right to be safe at work, and to be fairly compensated in the event of a workplace injury. This community expectation should be the primary and overriding factor that the committee takes into consideration when considering any potential amendments to the Act.

[1] Safe Work Australia. *The Cost of Work-Related Injury and Illness for Australian Employers, Workers and the Community.* March 2009. Available at: http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/178/CostsofWorkRelatedInjuryAndDisease_Mar2009.pdf

Background to the Comcare scheme

10. The *Safety, Rehabilitation and Compensation Act* ('the Act') was first passed in 1988, and was intended to provide a predominantly 'no-fault' scheme for Australian public servants. Common law damages were retained within the scheme but damages were capped at $110,000, a cap which remains today with the effect of phasing the common law out of the scheme. Rather than apportioning blame, the no-fault system of compensation presumes that workplace incidents and injuries have a variety of causes, and workers are nevertheless entitled to income replacement, medical coverage and permanent impairment benefits. The no-fault system merely requires work to be a contributing factor to an injury in order for a worker to be compensated for that injury.
11. A feature of the Bill under consideration by this inquiry is that it seeks to re-introduce the notion of fault to the Comcare scheme and to thereby deny injured workers access to benefits, without any counter-balancing improvement to common law or other entitlements.
12. Most workers compensations schemes in Australia are known as 'hybrid' schemes and include by common law benefits and statutory 'no-fault' benefits to compensate injured workers. Other than Comcare, the exceptions have been the no-fault Northern Territory and South Australian workers compensation schemes. In relation to South Australia, the government has recently announced that it will re-introduce common law rights, alongside statutory no-fault benefits.
13. The ACTU advocates for both no-fault benefits for injured workers and common law rights – a hybrid scheme. Access to common law damages is a fundamental element of any workers injury compensation system. Awards at common law can more closely reflect community standards and expectations with regard to proven employer negligence. Awards at common law also provide scope for those more seriously injured as a result of the negligence of their employer to exit the workers injury compensation system with dignity while maintaining financial surety.
14. The national Comcare scheme was historically intended to cover Australian public sector employees. This changed in 2004 when the Howard Government opened up the scheme to the private sector. There are currently 29 licensees operating under the Comcare scheme.[2] Their operations are overseen by just 44 inspectors nation-wide. [3] Some jurisdictions, for

[2] Safety, Rehabilitation & Compensation Commission. *Current licensees.* Available at: https://www.srcc.gov.au/self_insurance/current_licensees as of 30 May 2014.

[3] Senate Standing Committee on Education and Employment. *Questions on Notice: Additional Estimates 2013-2014.* Available at: http://www.aph.gov.au/~/media/Estimates/Live/eet_ctte/estimates/add_1314/answers/EM0152_14.pdf

example Western Australia, are understood to have as few as two inspectors to cover the entire state.

15. Notwithstanding this, for the vast majority of employees outside the public sector, compensation schemes have traditionally been, and continue to be, administered by state and territory governments. The states are in the best position to regulate health and safety and investigate and process claims, based on their long history as full service regulators and significant expertise in assessing claims for industries relevant to their geographical area.[4]
16. As part of the *Review of the Safety, Rehabilitation and Compensation Act (SRC) 1988*, undertaken by Allan Hawke and Peter Hanks in 2012 ('the Hanks- Hawke Review'), 147 key recommendations were made in relation to the Comcare scheme.[5] The review concluded that inadequate regulation of Comcare was leading to inferior outcomes in relation to claim management, and suggested establishing a "more robust regulatory framework to improve performance"[6], as well as other suggestions relating to performance improvement. This included establishing time frames for the lodgement, determination and appeal of claims. The Australian public sector is the only jurisdiction that administers its compensation scheme without mandated time frames for decision making about liability and benefit payment.
17. To date, no eligible employer that has applied for admission to be covered by Comcare has been refused a license. No employer has ever had their license revoked, or been removed, except under their own application to do so.
18. It is important to note that whilst the Safety Rehabilitation & Compensation Commission has some statutory power, those powers are inadequate to the task. The ACTU submits that no further licenses should be granted until such time that the licensing and regulatory functions of the Safety Rehabilitation and Compensation Commission are improved.

[4] NB. We acknowledge that privately underwritten schemes in Tasmania, the ACT, WA and the NT have no or very limited state scheme regulation, and are therefore referring here specifically to centrally regulated schemes.
[5] For reference, we have appended the ACTU's submission to the Hanks-Hawke Review with this document.
[6] Allan Hawke. *Safety, Rehabilitation and Compensation Act Review. Report of the Comcare Scheme's Performance, Governance and Financial Framework.* Page 3, Recommendation 3. 29 April 2013.

Summary of the Bill

19. The *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014* ('the SRC Amendment Bill') will have a significant impact on workers within the Comcare scheme, as well as resulting in the loss of rights and protection for workers whose employers may join the scheme. In summary, the Bill will have the effect of massively expanding the Comcare scheme while at the same time stripping back important protections for workers. There has been no concomitant commitment by the current government to expand the Comcare inspectorate in order to deal with the expected increase in their workload.
20. The Bill proposes to:
    a) Repeal section 100 of the SRC Act, which would remove the requirement for a Ministerial declaration in order for an eligible applicant to enter the Comcare scheme, and instead allow any 'national employer' (being an employer operating in two or more states or territories) to apply to join. The definition of a 'national employer' would replace the current requirement that an employer must be in competition with a public service authority (past or present) to be eligible. The simpler application processes would create a lesser test and a wider gate for corporations or other smaller businesses to be granted self-insurance rights under Comcare.
    b) Insert a new section, s107B, which would allow two or more corporations to apply for a group employer license, allowing them to join the Comcare scheme even if the corporations individually operate in only one workers compensation jurisdiction. This would allow smaller employers (noting there is no minimum employee numbers specified) operating in only one state or territory to opt out of the state workers compensation scheme in favour of Comcare. This proposal could result in the collapse of schemes in the smaller jurisdictions where there is an abundance of micro and small enterprises – for example, ACT, NT and Tasmania.
    c) Remove wording at the end of subsection 14(3) of the Act that currently serves to extend compensation coverage to employees who engage in serious and wilful misconduct where that misconduct results in death or serious and permanent impairment. The purpose of this, according to the Explanatory Memorandum, is to "ensure that the high importance placed on adhering to work health and safety requirements is not demeaned by people acting in such a manner."[7] In reality, removing this exemption would only serve to further punish workers and their families who have already been severely punished. In the case of deceased workers and those who are seriously impaired, they will obviously not be in a position to counter

[7] House of Representatives. *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014: Explanatory Memorandum.* Page 44.

an employer's allegation about their conduct. A carve out is made for defence personnel such that ADF members can continue to access compensation in cases where serious and wilful misconduct has resulted in death or impairment.

d) Replace paragraph 6(1b) of the Act to provide that an injury sustained by an employee will only be eligible for compensation if the employee is on the employer's premises. Employees who are temporarily absent from the premises, such as on a recess break in the course of their employment, will no longer be eligible for compensation. Employees who were temporarily absent from work but undertaking an activity associated with their employment would remain eligible for compensation; however, there are substantial grey areas involved. We note that the scheme originally covered injured workers on recess breaks. This cover was removed in 2007 and re-instated in 2011.

e) Substitute subsection 6(3) of the Act with a new section which exempts workers from being eligible for compensation claim if the employee 'sustained the injury because he or she voluntarily and unreasonably submitted to an abnormal risk of injury'. This extends an exclusion from benefits that currently applies only to recess breaks, to the duration of work-time.

Expansion of the Comcare scheme

21. The repeal of s100 (removing the Ministerial declaration requirement) and insertion of s107b (allowing for group employer licenses) would have the practical effect of massively expanding the number of employers operating under the Comcare scheme.
22. The rationale given by the government for this change is that the expansion of Comcare will lead to more 'equity' for employees – in other words, workers within the same company (or group of companies) having the same rights and standards. A principle component of equity is fairness; so whilst the shift to Comcare may give all workers the same rights, depending upon the state jurisdiction the worker may be transferred from, those rights could be lesser rights and therefore less equitable than those from which they have been removed without a say.
23. Although supportive of nationally consistent compensation standards, we believe in fair and appropriate standards, not the lowest common denominator.
24. The union movement remains concerned with the current operation of the Comcare scheme, and believes that an expansion of the scheme would be a step in the wrong direction until and unless fundamental flaws within the existing system are addressed first.
25. Our main concerns with the current operation of the Comcare scheme are as follows:
    a) Self-insurance will be open to abuse by employers who do not wish to assist injured workers to return to work because, due to resourcing constraints, Comcare is not adequately equipped to monitor performance or hold self-insurers to account on a national scale if the self-insurer does not meet injury management and return to work obligations.
    b) The likelihood and impact of an exodus of employers from State schemes and the undermining of the viability of State schemes has not been adequately addressed. It is noted that Comcare has cheaper premiums that are likely to create a pull factor at the expense of the rights of injured workers.
    c) There are privacy concerns relating to the administration of workers compensation by self-insurers. The insurer and employer must be separated during the administration process, in the same manner as the relationship between a private insurer and the employer as a client, to fully protect employee privacy.
    d) Comcare has historically initiated low rates of prosecutions. This is doubly concerning because this substantially no-fault scheme is not able to expose safety failure through common law or other examination processes.
    e) Comcare does not have adequate resources or capacity to enforce OH&S (WHS) standards nationally across a wide group of industries.

f) The definition of 'national employer' does not specify a minimum number of employees required in a particular Australian Jurisdiction. Therefore, there is room for abuse by employers whose business is basically in one state or territory. An example is a mining corporation located in Western Australia, with a Sydney office staffed with one employee.

g) Group licenses are of particular concern as small employers are, in general, not particularly well equipped to administer a self-insurance scheme. They will detract from OHS outcomes by removing the need for the Commission to have a specific focus on particular business operations.

h) The Comcare scheme is the only scheme that doesn't specify timelines in relation to the processing of claims, only specifying that they should be processed in a 'reasonable period of time'. There is a dispute resolution process if the outcome of a claim is considered unsatisfactory, but this is subject to long delays. The Comcare scheme could be greatly improved if the Act or Regulations were amended to provide prescribed timeframes for the assessment and disputation of a claim, including penalties where those timeframes are unmet.

i) There is very little statutory provision for a proper review under the Comcare scheme. It is our position that a review should be automatically be triggered in the event of a workplace death, or if there are repeated and untoward failures of health and safety standards by the employer. It is also highly important that employees be properly consulted during each review, including through an opportunity to vote on whether the employer should remain in the scheme.

26. It is our position that self-insurance should only be available to employers who have an exemplary record in health and safety, a demonstrated commitment to workers' rights, and no disadvantage to the employee. Further, employers seeking to become, or to remain, licensees must be able to demonstrate having completed a transparent process of consultation that results in the majority of their employees genuinely favouring coverage, or continuing coverage, by the Comcare scheme.

27. It is concerning that despite s104(2)(c) of the Act stating that a license should not be granted if it would be 'contrary to the interests of the employees', there is at present no proper or adequate interest test applied to license applications. The system would be greatly improved with the introduction of a 'no disadvantage test' which employers would be required to meet before a license can be granted.

28. In rebuttal to the government's claims that the expansion of the Comcare scheme will automatically reduce the regulatory burden on employers, we argue that the opposite is, in fact, the case. This is because all employees with a current compensation claim through a state or territory jurisdiction will continue under that jurisdiction until the expiry of their

compensation. This would have the practical effect that all new entrants to the Comcare scheme will be required to administer both state and national schemes until all existing claims have been worked through the system.

29. It should also be noted that the government's own Commission of Audit recommended major structural changes to the Comcare scheme, suggesting that Comcare be abolished and that its functions be relocated to the Department of Employment. The Commission also recommended that "consideration should be given to Comcare's claims management operations being outsourced and private sector underwriting of Comcare's workers compensation insurance scheme."[8] The practical effect of these recommendations would be to privatise the Comcare system, which would be a dramatic departure from the way the system currently operates. To be clear, we are strongly opposed to the privatisation of the Comcare scheme and the outsourcing of claims management in general. There would be grave concerns for the independence of the claims management system if Comcare were to cease to exist as a statutory agency and its function were subsumed into the Department of Employment.
30. Nonetheless, in light of these recommendations, to which the government has not yet elaborated on an official response, it would be inappropriate for Parliament to enact the proposed amendments without the government first resolving the broader question of the future of Comcare.

[8]National Commission of Audit. *Towards Responsible Government: The Report of the National Commission of Audit. Phase Two.* Page 93. March 2014.

Recess Breaks

31. At present, all state and territory jurisdictions, with the exception only of South Australia and Tasmania, provide compensation for injuries sustained during a recess break. This means that all workers currently residing in Victoria, the ACT, New South Wales, the Northern Territory, Western Australia and Queensland will be materially worse off if the proposed amendment, in relation to recess breaks, succeeds.
32. The government's rationale for carving out recess breaks from compensation coverage is that "costs will be reduced by removing injuries that occur in circumstances outside the control of the employer from the coverage of the Comcare scheme."[9] It is debatable what impact, if any, these changes would have on the premiums paid by employers, which are already the lowest in the country, and at any rate, the very small cost saving arising from these changes is outweighed by the high price that workers would pay as a result.
33. There are a number of legal grey areas arising from the proposed amendment in relation to rest breaks. For example, the definition of 'place of work' under the Act is fairly ambiguous, being defined under s4 as "any place at which the employee is required to attend for the purpose of carrying out the duties of his or her employment." There is some debate over whether, for example, a construction camp built near a mine site would be considered a 'place of work'. If so, given that an employee doing fly-in-fly-out (FIFO) work is required to be located in a particular town or camp, would the entire town or camp constitute the employee's place of work, or only a section of it? If an employee works in a building with several other employers' offices and the incident occurs in the building's common area, such as the foyer or elevator, does this constitute the employee's place of work? Would the outside of the building be classified as a place of work, given the employee is required to enter the building from that particular street or entrance?
34. An additional grey area relates to the Act's definition of being "temporarily absent from the employee's place of work undertaking an activity associated with the employee's employment" (s6(1)(c)). Would a fitness activity that has been sponsored by the employer, such as a lunchtime charity fun run or an employee-only fitness program, constitute an 'activity associated with the employee's employment'? Would a worker be covered if they were travelling to their next meeting or appointment while on their lunch break? And what if the employee was attending a social work function, such as a birthday celebration for a colleague? Or alternatively if they are engaged in a work-related conversation with a colleague when the incident occurs, how would that affect the employee's access to compensation?

[9] House of Representatives. *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014: Explanatory Memorandum.* Page i.

35. With an increasing tendency for employees to be engaged in flexible working arrangements, the concept of an employee's 'usual place of employment' is becoming less clear. Many industries now have massive centralised call sites where the employees 'hotdesk' or are provided with a laptop and encourages to make use of local social meeting places to conduct work on the road. There are also employees who work from home, who regularly make home visits and out-of-hours calls on prospective clients outside of a traditional work environment.
36. In summary, the proposed amendment would only serve to shift the burdens and risks associated with employment further onto an employee –bear in mind, the only reason why the employee is on break is as a result of being in employment at that particular location in the first place. Therefore the only test that should be applied to determine whether compensation is due is whether work was a contributing factor to the injury.

Serious and Wilful Misconduct

37. Our workers injury compensation system rightly operates on the concept of 'no fault' for all workplace injury and diseases. Any watering down of the concept of a no-fault compensation scheme would only serve to increase the red tape burden on employers, who will then be required to maintain extensive records and collect evidence to determine whether serious and wilful misconduct is a contributing factor to a death or impairment, and to what extent this may be the case.
38. Moving back to an adversarial system represents a cost-shifting exercise by workers compensation schemes onto injured workers and government services. Any savings incurred as a result of this amendment would be negligible, and likely outweighed by the serious impost associated with going through a review process and trying to prove or disprove a claim.
39. An example of this would be the recent case of a truck driver on a remote construction work-site. The driver jumped from his work truck to open a gate and in doing so tripped and fell. The truck rolled over the drivers' leg and he became trapped. A second driver reversed the truck intending to free the injured driver and in doing so caused further injuries. The leg was subsequently amputated.
40. The injured driver has no recall of the circumstances and is believed to have passed out. This is a common side effect of significant injuries caused by a traumatic incident. The employer in this case has suggested wilful misconduct but five months after the incident has not made a formal decision.
41. This case highlights the complete lack of procedural fairness such an amendment would cause.
42. There is a community expectation that if an employee suffers from a workplace injury resulting in serious impairment or death, the individual has already paid an extremely high price. Therefore, even if their own actions may have been a contributing factor in the incident (which can be very complex to prove or disprove either way), such employees should still be afforded workplace protections and compensation. The exclusion in the current legislation was put in place for severely injured or deceased workers as they and their families are disadvantaged in proving their case.
43. Moreover, in the event that death has occurred, families of the deceased have paid the ultimate price for their loved one's momentary lapse of judgement and should not be further penalised as a result of their death. If the amendment were to pass, the onus of proof would fall to the worker or (in the case of death) the worker's estate, making it relatively easy for an employer to discharge that onus in the face of a significantly injured or deceased employee. Despite the characterisation of the misconduct as 'wilful', where death has been caused,

how can the deceased's actions be considered 'wilful' without the worker having an opportunity to respond to an employer's allegation? The same issue may arise in instances of catastrophic injury where the injured worker is unable to explain the circumstances of a work place incident.

44. Given the lack of procedural fairness afforded to a severely injured person or the dependants of a deceased, we have serious doubts about this amendment.
45. 68 Australian families this year have already had a loved one die in a workplace incident. These families are in an extremely stressed and vulnerable position. Would any Australian employer truly relish explaining to those families, in a time of great tragedy, that their compensation claim is being delayed or perhaps even denied due to an allegation of serious misconduct? And all for a miniscule (perhaps non-existent) saving on an insurance premium?
46. As a community, we acknowledge that sometimes incidents happen and there is not always a need to assign blame. This is the fundamental principle underpinning our no-fault system, and any attempts to erode this principle should not succeed.

Abnormal Risk of Injury

47. A further amendment is proposed so that compensation for injuries is not payable to a worker in cases where he or she 'voluntarily and unreasonably submitted to an abnormal risk of injury' in the course of employment. This exclusion previously only applied to injuries sustained in particular places, or during an ordinary recess. The exclusion now applies in *all* circumstances; that is, even when the worker is engaged in their usual duties.
48. The potential ramifications of this amendment are severe. An example would be if a supervisor directs an employee to undertake an action which the employee reasonably suspects may put them at risk. If the employee ignores their gut instinct or underlying concern and is injured as a result of unsafe action at the direction of the employer, the proposed amendment could serve to exclude that employee from access to compensation.
49. This amendment is yet another example of an attempt to shift the onus onto the employee to make individual assessments, potentially with no guidance from the employer, as to what level of risk is or is not acceptable in the normal course of employment. In general, such judgement calls should be made by the employer, not the employee.

Summary

50. If enacted, the proposed amendments will significantly change the face of workers injury compensation in Australia as we know it.
51. The proposed amendments:
    a) fly in the face of community sentiment and expectation in relation to safe and decent working conditions;
    b) will be ineffective in reducing regulation costs for employers and in some instances may actually increase it;
    c) will strip away important and hard-won protections that have been put in place to give workers and their families peace of mind in the event of an injury;
    d) may be inequitable, potentially leading to lesser compensation payments than workers would otherwise have received under their state system;
    e) will unfairly shift the risks and burden of employment away from the employer and onto the employee; and
    f) will massively overburden a Comcare scheme that is already operating on limited resources.
52. Amending the SRC Act is not a sound strategy by which to achieve harmonised workers injury compensation laws. This is what these amendments propose to do by stealth.
53. And disappointingly, there is not one mention about improving rehabilitation and return to work efforts and outcomes, which lie as the key objectives underpinning all schemes. Whilst this may be outside the scope of this inquiry, it is worth mentioning.
54. Despite a comprehensive review into the Comcare system by Allan Hawke and Peter Hanks, which was handed down less than two years ago, this Bill seeks to rush through ill-considered amendments while ignoring key recommendations of the Hanks-Hawke Review. The changes that the amendment proposes to make are unbalanced and would only serve to disadvantage workers, whereas none of the Hanks- Hawke recommendations that would benefit workers, such as the recommendation in relation to statutory timeframes for claims management, have been considered. This makes the proposed amendments completely one-sided.
55. For all of the above reasons outlined, we oppose this Bill in its entirety.
56. We would strongly urge the Committee to recommend against the enactment of the *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014.*

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