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SENATE

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
LEGISLATION COMMITTEE

**Reference: Occupational Health and Safety and Other Legislation Amendment Bill
2009**

THURSDAY, 18 FEBRUARY 2010

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SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

LEGISLATION COMMITTEE

Thursday, 18 February 2010

Members: Senator Marshall (*Chair*), Senator Cash (*Deputy Chair*) Senators Back, Bilyk, Jacinta Collins and Hanson-Young

Substitute members: Senator Siewert to replace Senator Hanson-Young for the committee's inquiry into the Occupational Health and Safety and Other Legislation Amendment Bill 2009

Participating members: Senators Abetz, Adams, Barnett, Bernardi, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Colbeck, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Back, Cash, Collins and Marshall

Terms of reference for the inquiry:

To inquire into and report on:

Occupational Health and Safety and Other Legislation Amendment Bill 2009

WITNESSES

BAXTER, Ms Michelle, Group Manager, Safety and Entitlements Group, Department of Education, Employment and Workplace Relations 1

CARAPPELLUCCI, Ms Flora, Branch Manager, Safety and Compensation Policy Branch, Department of Education, Employment and Workplace Relations 1

LIS, Mr Henry, Branch Manager, Workplace Relations Legal Group, Department of Education, Employment and Workplace Relations..... 1

Committee met at 10.01 am

BAXTER, Ms Michelle, Group Manager, Safety and Entitlements Group, Department of Education, Employment and Workplace Relations

CARAPPELLUCCI, Ms Flora, Branch Manager, Safety and Compensation Policy Branch, Department of Education, Employment and Workplace Relations

LIS, Mr Henry, Branch Manager, Workplace Relations Legal Group, Department of Education, Employment and Workplace Relations

CHAIR (Senator Marshall)—On 26 November 2009, the Senate referred the provisions of the Occupational Health and Safety and Other Legislation Amendment Bill 2009 to the Senate Education, Employment and Workplace Relations Legislation Committee for report by 25 February 2010. The bill amends the Safety, Rehabilitation and Compensation Act 1988 to introduce time limits for claim determinations, reinstate workers compensation coverage for injuries arising from off-site recess breaks, allow for medical expenses to be paid where payment of other compensation is suspended, and restore Comcare's access to the Consolidated Revenue Fund to pay compensation claims in respect of certain diseases with a long latency period.

Witnesses appearing before the committee are protected by parliamentary privilege. This gives them special rights and immunities because people must be able to give evidence to committees without prejudice to themselves. Any act which disadvantages a witness as a result of evidence given before the Senate or any of its committees may be regarded as a breach of privilege. I welcome Senators Cash and Back via teleconference from Western Australia. I also welcome representatives from the Department of Education, Employment and Workplace Relations. Thank you for your submission. I invite you to make some opening remarks to the committee, to be followed by questions.

Ms Baxter—Thank you for inviting DEEWR to appear before this inquiry. The Comcare scheme provides workers compensation and occupational health and safety arrangements for employees of the Australian government and some private sector companies that are licensed to self-insure their workers compensation liabilities under the scheme. In line with its election commitment, in December 2007 the government imposed a moratorium on private sector companies seeking to join the Comcare scheme and announced a review of the scheme to ensure it provides a suitable workers compensation and OHS system for self-insurers and their employees. On 25 September 2009, the Minister for Employment and Workplace Relations announced a number of improvements to the Comcare scheme following that review. These include reinstating workers compensation coverage for injuries arising from off-site recess breaks, providing for payment of medical expenses notwithstanding that payment of other compensation benefits have been suspended, and introducing statutory time limits for workers compensation claims determination.

The Occupational Health and Safety and Other Legislation Amendment Bill 2009, the OHSOLA Bill, implements these legislative aspects of the government's response to the Comcare review. The bill also restores Comcare's access to the Consolidated Revenue Fund, the CRF, to pay compensation for certain long latency disease claims and provides for lifts to be regulated as plant under the Occupational Health and Safety Act 1991. It also makes a number of minor technical amendments consequential on the commencement of the Legislative Instruments Act 2003.

The Parliamentary Library's *Bills Digest* of 6 January 2010 and one of the submissions to this Senate inquiry have raised two issues in relation to the provisions of the OHSOLA Bill covering the proposed introduction of statutory time limits for processing workers compensation claims. One issue raised is that there is no indication provided as to the length of the proposed time limits. Another issue is the absence of any sanctions in the bill for failure to comply with the time limits. Regarding the length of the proposed time limits, the government is currently considering this matter. The time limits will be set out in regulations rather than in the act itself. This will provide the flexibility to modify time limits in the future in response to ongoing improvements in the jurisdictions' claims determination process.

With regard to the absence of sanctions for failure to meet the statutory time limits, there are other levers which will encourage compliance. Once adopted, the time limits will set the standard against which the scheme regulator, the Safety, Rehabilitation and Compensation Commission, the SRCC, will monitor the performance of Comcare and the self-insurers in relation to the timeliness of determining claims. The SRCC will report on performance against that benchmark through its annual report. As well, for those workers compensation claims which are processed by Comcare, it will be necessary for Comcare to provide

information yearly, in its annual report, on its compliance with statutory obligations. Comcare's chief executive officer will be accountable for ensuring that Comcare meets its obligations with regard to statutory time limits for processing claims. For those workers compensation claims which are processed by the self-insurers, the SRCC has a tier structure for regulating self-insurers whereby failure to meet their obligations results in stepped-up regulatory requirements. The ultimate sanction against a self-insurer for failure to meet their obligations would be not to renew their licences, which come up for renewal every three years.

The Senate Standing Committee for the Scrutiny of Bills raised a query in its *Alert Digest* No. 1 of 2010 regarding the proposed amendment in item 10 of schedule 3 of the bill. Item 10 sets up a mechanism to validate certain CRF drawings by Comcare between 1989 and 2006 which were retrospectively invalidated as a result of a Federal Court decision. As unauthorised drawings these constituted debt owed to the Commonwealth. The validation mechanism works in this way: it confers on Comcare a notional one-off entitlement to CRF moneys equivalent to Comcare's unauthorised CRF drawings between 1989 and 2006 which is then offset against the debt owed to the Commonwealth. Because the two amounts are the same, the debt is reduced to zero. This mechanism precludes the need for an actual recovery of the unauthorised drawings by the Commonwealth.

It is not possible to estimate reliably the drawings from CRF that have been retrospectively invalidated, and thus it is not possible to quantify the amount appropriated by item 10(5) of the bill. This is due to the difficulty in identifying the relevant payments over an almost 20-year period. Comcare has therefore disclosed the drawings as an unquantifiable contingent liability in its annual report 2008-09, and these amendments have been drafted on legal advice from the Australian Government Solicitor.

The OHSOLA Bill reinstates workers compensation coverage for injuries occurring during off-site recess breaks, realigning Comcare with all but two state and territory jurisdictions. As earlier stated, the OHSOLA Bill also amends the definition of plant in the OHS Act 1991 to specifically include lifts. Under the OHS Act, employers in the Commonwealth jurisdiction have a general duty of care to take all reasonable practicable steps to protect the health and safety at work of their employees. Amending the definition of plant to include lifts will provide certainty to employers and allow Comcare to undertake important regulatory work in relation to lifts, including inspections, design, registration and licensing.

Finally, as earlier stated, the bill makes a number of minor technical amendments to various acts consequential on the commencement of the Legislative Instruments Act 2003. We welcome any questions the committee may wish to ask in relation to the bill. Thank you.

CHAIR—Thank you, Ms Baxter. We might go to Senator Cash, if you are ready for some questions, Senator.

Senator CASH—I am, thank you, Chair. To give an indication of the general structuring of my questions, I have a number of general questions and then I have some specific questions in relation to the off-site recess breaks, the payment of medical expenses and the time limits. In terms of the general questions, can I ask what consultation took place with those self-insurers under Comcare and the department or the government with respect to the changes provided in this bill?

Ms Carapellucci—The changes introduced in the bill represent the legislative changes arising out of the Comcare review. That review took place over approximately a nine-month period and there was a public comment process. The department drew on a range of evidence in preparing its report to the minister. The department had regard to the public submissions. It also had regard to the report prepared by a consultant that was engaged by the department.

Senator CASH—Did many self-insurers provide submissions to the Comcare review?

Ms Carapellucci—Yes, they did, although I would need to check the number of submissions that were received from self-insurers.

Senator CASH—Thank you very much. Other than seeking legislative consistency with various state schemes, can I ask what evidence exists that gave rise to the amendments dealing with off-site recess breaks and the payment of medical expenses—those two specific amendments?

Ms Carapellucci—I am sorry, I did not quite catch the start of the question.

Senator CASH—Other than seeking legislative consistency with various state schemes, what evidence exists that gave rise to the amendments dealing with off-site recess breaks and the payment of medical expenses?

Ms Carapellucci—In relation to off-site recess breaks, there was a concern that there would be inequity between employees whose employers do provide facilities on site for recess breaks and those employees whose employers do not provide on-site facilities. There was another concern in relation to the difficulty in determining what would and what would not constitute an off-site recess break—for example, in cases where employees are required to undertake their work off site. To give an example: if a Telstra technician whose usual place of work is their vehicle parks their vehicle at the side of the road to have a break, is that an on-site or an off-site recess break?

Senator CASH—Who actually raised those concerns?

Ms Carapellucci—I understand some of them were raised in submissions to the review. The specific concern about determining what is on site and off site has also come up in some of the cases that Comcare has had to deal with.

Senator CASH—I do note, though, in the Comcare review report that the department actually recommends against the reintroduction of the off-site recess breaks.

Ms Carapellucci—Yes, that is right. The department provided its report to the minister, the government then considered a range of other factors and the government announced its response, which was to reintroduce off-site recess breaks.

Senator CASH—You said the government considered a range of other factors. Can I ask what those other factors were?

Ms Carapellucci—That is a matter for the government.

Senator CASH—So you provided your report and, as far as you were concerned, your recommendations were your recommendations?

Ms Baxter—Yes, that is right.

Senator CASH—Okay. In relation to the payment of medical expenses, could I get you to briefly deal with the evidence existing that gave rise to those amendments.

Ms Carapellucci—Yes, Senator. The Safety, Rehabilitation and Compensation Act provides for workers compensation payments to be suspended where employees do not comply with certain requirements under the act—for example, to participate in a rehabilitation program. The way the act is currently structured, when those benefits are suspended it suspends all benefits. It suspends weekly compensation payments as well as payments for medical expenses. The rationale is that in fact that might be counterproductive to a person's recovery and effective return to work by penalising an employee by also suspending the medical expenses. So the bill would provide that in such a case it is only the weekly compensation benefits that are suspended, but a person would continue to have their ongoing medical expenses paid for.

Senator CASH—So what you are telling me is that the evidence is that it would be counterproductive to a return-to-work process if the medical expenses are also suspended.

Ms Carapellucci—Yes, that is right.

Senator CASH—I will just delve a little further and ask you about specific, actual examples that the government/department is aware of and that highlight the need for both of those amendments—the off-site recess breaks and the payment of medical expenses.

Ms Carapellucci—In relation to the off-site recess breaks, we would have to take that on notice in terms of numbers of claims and so on. In terms of the suspension of medical benefits, I am advised by Comcare that it is actually a small number of employees per year who have their workers compensation benefit suspended; it is in the order of a few dozen.

Senator CASH—I am happy for you to take this on notice. Obviously questions should be answered sooner rather than later, because I think we are reporting next week. So, if I could get the information sooner rather than later, that would be appreciated.

Ms Carapellucci—Yes, certainly.

Senator CASH—Thank you. My final general question before I turn to the specific items in the legislation is: in the event that the bill does pass through the parliament, what is the intention of the department with respect to the education of those affected about the changes?

Ms Carapellucci—Any education about it would probably be undertaken primarily by Comcare as the regulator for the scheme. Comcare would generally work closely in consultation with the department.

Senator CASH—Do you have any indication on whether there would be education in relation to these changes?

Ms Carapellucci—Yes, Comcare has indicated that there would be education in relation to these changes, as there would be with any other change to the scheme.

CHAIR—I will just ask a follow-up question on that. Are the self-insurers obliged to undertake their own education campaign about any changes, or is the burden of that left to Comcare?

Ms Carapellucci—Comcare would be required to educate the self-insurers. The employees of the self-insurers would have access to the same information that employees of premium-paying agencies would have. That is information available in the public domain on Comcare's website.

Senator BACK—Before Senator Cash continues with specific questions, could you clarify a possible misunderstanding I have with regard to off-site recess breaks. My confusion is this: if an employer sends an employee to another place to work, whether as in your Telstra example or to an education institution for employer sanctioned courses, in my mind I would not regard that as being anything other than the employee continuing their link to the employer for the purposes of insurance. My question to you is: when you speak of off-site compensation cover, could you just explain this to me for a moment. If an employee leaves their place of work during their lunchbreak to go and attend to their own business, unrelated to the workplace, what is the impact of this amendment for that person?

Ms Carapellucci—That person would be covered for that period.

Senator BACK—Under this process?

Ms Carapellucci—Yes.

Senator BACK—So what if the person in their lunch break decided they were close enough to the beach, went snorkelling, dived into the water and hit their head? Under this proposed amendment would they actually be covered for that activity?

Ms Carapellucci—Yes, they would.

Senator BACK—Is that made clear? My distinction is this. In my own mind I do not see somebody being off site if the employer sends them away from their normal place of work to undertake a task. Whether it is a carpenter doing some carpentry or a plumber doing some plumbing I can immediately see that that person effectively from the viewpoint of their relationship with their employer remains on site and therefore must surely be fully covered. My concern very actively here is that the employer quite rightly has no control over the activities of the employee if they decide to leave their workplace during a recreation break. I mentioned a lunch break because it does give someone the opportunity to engage in some other activity. For example, if they went to the gymnasium and had an accident on a piece of gym equipment, under this proposed amendment they are actually going to be covered under occupational health and safety legislation.

Ms Carapellucci—Yes, they would be covered by workers compensation legislation.

Senator BACK—I think the documentation suggests that with the exception of South Australia and Tasmania all other states and territories currently make that provision.

Ms Carapellucci—Yes, that is right.

Senator BACK—It surprises me that the impact would be as minimal as you have outlined to us in the submission with a 0.7 per cent increased premium. Perhaps it is not within your purview to be able to answer, but could this potentially lead to a situation in which employers would reasonably or unreasonably try to exercise some limit over the activity of their employees during their lunch breaks?

Ms Carapellucci—I am not able to comment on that.

Senator BACK—Do you understand where my concern lies?

Ms Baxter—Yes, we do, Senator. The proposed amendment is really just to bring the Commonwealth back into line with most other jurisdictions. It stems primarily from the fact of the degree of confusion that we have had reported to us that we have discussed with other regulators in other jurisdictions in terms of sometimes there is a lack of clarity about when a recess break is onsite or offsite. Because the financial impact is so minimal this was seen as an appropriate measure to bring things back into line.

Senator BACK—Yes. The example that someone gave a few minutes ago of a Telstra worker on the side of the road having lunch in his car, I can immediately relate to as being one where the employer and the system should obviously cover that employee for the very reason that they are not really free at that time to do anything other than to have their lunch and then proceed. The hypothetical to which I refer is one that I guess rings alarm bells for me. I just simply voice it. You may care to go back and look in the history of claims in a case called Nagle and you might understand where my concern lies. Thank you.

Mr Lis—The SRC Act currently contains provisions that make it clear that compensation is not payable in respect of self-inflicted injuries and that would clearly carry over to recess breaks as well as any injuries that are a result of serious or wilful misconduct on the part of the employee. There are other provisions that actually come to bear on this.

Senator BACK—Thank you for that clarification. I appreciate it.

Ms Carapellucci—I also add that there is an additional provision that excludes cases of an employee sustaining an injury because he or she voluntarily and unreasonably submitted to an abnormal risk of injury.

Senator BACK—So those are—

Senator CASH—They are in section 14 of the current act.

Ms Carapellucci—Yes.

Senator BACK—Thank you very much for those.

Senator JACINTA COLLINS—What are the provisions within this framework for journey incidents—people travelling to and from work? Are they covered or not covered?

Ms Carapellucci—They are not covered.

Senator JACINTA COLLINS—Is there any other area within this scheme that deals with the tradition of no-fault coverage?

Ms Carapellucci—The act is based on a no-fault concept, in that to have a claim accepted an employee does not have to show that the employer was negligent in any way.

Senator JACINTA COLLINS—I am interested in fleshing this out a bit further. You did not address this issue in your opening comments in terms of the submissions, but one of the witnesses, I think it was K&S Corporation, raises this point—that is, their opposition to this provision on coverage over break periods because they do not have control over what an employer may be doing, which is in obvious conflict with the no-fault principle within coverage for people. It is much starker and clearer in those regimes that have in the past covered journey incidents for workers compensation, because an employer cannot be responsible for an employee's journey home or their mode of transport, for instance. Is there nothing comparable in this regime?

Ms Baxter—No.

Senator JACINTA COLLINS—But you do make the point that a no-fault philosophy is actually the basis of this scheme?

Ms Baxter—Yes, that is right.

Senator JACINTA COLLINS—Thank you.

Senator CASH—I turn specifically to the amendments contained in schedule 3, item 1. I apologise if I am re-canvassing questions that Senator Back raised. Can you provide me with the definition of an 'ordinary recess' under that part of the act? Could you also provide me with examples of what actions would fall within the definition of 'ordinary recess'?

Ms Carapellucci—There is no definition in the SRC Act of 'ordinary recess'. It would rely on the normal understanding of that, so it would cover lunch breaks and other authorised breaks.

Senator CASH—I want to explore that further with you. I do know that there is no definition in the act—I looked it up myself and it was not there—but you said it would rely on 'the normal understanding of'. Would you please explain to me what 'the normal understanding of' actually is?

Ms Carapellucci—As I mentioned, it would cover lunch breaks and other breaks that are authorised by the employer.

Senator CASH—What type of breaks are 'other authorised breaks'?

Ms Carapellucci—It would depend on the nature of the industry and so on, but it would be rest breaks and the like.

Senator CASH—Would you please explain ‘and the like’?

Mr Lis—It is probably a question of fact in each particular case. It is hard to be too definitive about what is and is not a recess break.

Senator CASH—The words ‘ordinary recess’ are in the current act, aren’t they?

Ms Carapellucci—Yes, the term is in the current act.

Senator CASH—Can you give me an understanding of what the meaning of ‘ordinary recess’ is under section 6(1)(b) of the current act?

Ms Carapellucci—It would be a break that is authorised either by the employer’s practices or through an enterprise agreement or some other industrial instrument that applies to employment.

Senator CASH—The key there is that it is an authorised break.

Ms Carapellucci—Yes.

Senator CASH—Following on from some of Senator Back’s questions, if an employee leaves their workplace without permission—so without the authorisation you have just referred to—walks over the street to get a coffee and sustains an injury, will the employer be liable under the proposed amendments?

Ms Carapellucci—As Mr Lis mentioned earlier, it would depend on the particular facts of the case.

Senator CASH—Can we concentrate on the words ‘without permission’ or to use your terminology ‘not authorised by the employer’?

Ms Carapellucci—In that type of situation it would depend on whether an employer has explicitly prohibited an employee from going to buy a coffee. As I said, it would depend on the facts of the case, but if it was common practice in a workplace for people to leave that workplace to go and buy a coffee then it might be found that was an authorised break.

Senator CASH—But if, for example, an agreement stated that lunch was between 12 and one o’clock and that afternoon tea was between three and 3.15, but at 1.45 I decided to nip across the road and get a coffee, one might say that is not authorised by the employer.

Mr Lis—Again that would depend upon the arrangements that actually exist in that particular workplace.

Senator CASH—Is there a definition of a non-ordinary recess?

Mr Lis—No.

Senator CASH—Is there an understanding of what a non-ordinary recess is, based on the current provisions of the act?

Mr Lis—Again, these cases are looked at on a case by case basis and it all depends upon the particular circumstances in the workplace.

Senator CASH—Please take me through what degree of control the employer has with respect to the actions of an employee during their ordinary recess.

Ms Baxter—I am not clear about what you are asking us.

Senator CASH—If I look at it from a risk management perspective, what degree of control might an employer use to minimise the risks for workers that might exist during off-site recess breaks? For example, in other jurisdictions which already have this provision, are there steps that an employer can take to minimise the risk that workers might take during their authorised off-site recess breaks? Can the employer put caveats around what an employee is able to do during these breaks?

Ms Baxter—There are probably a number of things employers could do. One thing that comes to mind immediately is an employer organising rooms or facilities on-site for their employees to take their rest breaks in. I am sure there are many other mechanisms that employers might consider appropriate.

Senator CASH—Would you agree that there is no way that an employer can achieve 100 per cent risk management control for an employee who leaves the workplace for one of their off-site recess breaks?

Ms Baxter—Yes, that is correct.

Senator CASH—In section 14 of the current act, there are these provisions:

(2) Compensation is not payable in respect of an injury that is intentionally self-inflicted.

(3) Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee ...

In terms of the inclusion of off-site recess breaks, what is the process that will be undertaken by the employer to prove that the injury was self-inflicted, or, should I say, by the employee to prove that it was not self-inflicted?

Ms Baxter—Again, I think this is a situation that would need to be looked at on a case-by-case basis in terms of what the facts of each case were. It is not possible for us to provide assistance to you that would cover the field, I suppose. My concern is that we may give you a response but it would be quite limited, it would be in terms of a ‘for example’. One of those would be if an employee went out and wilfully got drunk on a recess break, for instance, and engaged in behaviour as a result of that drunkenness. Then there could be an argument, depending on all the other facts and situations in the case, that that person had contravened section 14(3) of the act.

Senator CASH—That is a process that the employer would need to go through to actually prove that it was self-inflicted?

Mr Lis—Comcare would need to actually assess the claim.

Senator CASH—Yes, Comcare. That is the process that they would need to go through if they wanted to rely on, say, section 14(1) or (2)?

Mr Lis—I should say Comcare in respect of some employers, and self-insurers would clearly do it themselves.

Senator CASH—Okay. In terms of the Productivity Commission report and their review of the OHS systems in 2004, which I know the department is aware of because it is referred to in your report, the Productivity Commission found:

- Coverage for recess breaks and work-related events to be restricted, on the basis of lack of employer control, to be restricted to those at workplaces and at employer sanctioned events.

As a result, we would all be aware, in 2007 the act was amended to reflect the above recommendation. What has changed since that time that would now alter the Productivity Commission’s recommendation, bearing in mind that recommendation 13 of the department in its report is:

- claims arising from injuries sustained during travel to and from work and off-site recess breaks, continue to be excluded.

So what actually has changed?

Ms Carapellucci—As you know, there has been a review of the Comcare scheme.

Senator CASH—That was the one by the department that you referred to earlier?

Ms Carapellucci—Yes.

Senator CASH—And I have got your recommendation sitting in front of me: recommendation 13.

Ms Carapellucci—Yes, and the government has now responded to the review.

Senator CASH—So are you aware of anything that has changed that would alter the recommendation that you made?

Ms Carapellucci—I referred earlier to some of the uncertainty surrounding the current recess break provisions, and in response to that the government has decided to reinstate coverage for recess breaks.

Senator CASH—Is that in relation to the submissions that were put forward to the review?

Ms Baxter—It is in relation to the government’s response to the review that the department conducted and is really about providing certainty where potential uncertainty has reigned.

Senator CASH—Okay, but what I am trying to get at is what is the evidence that was relied on. Can you point me to that? If there are submissions can you give me the names of the submissions so I can go and review them myself?

Ms Baxter—We can take that on notice.

Senator CASH—That would be greatly appreciated. That leads into my next question: what evidence exists that warrants return to the pre-2007 coverage? I assume that would be a similar answer and you would be able to direct me to the submissions that I need to go and review.

Ms Baxter—Pre-2007 coverage for what, Senator?

Senator CASH—The off-site recess breaks being included.

Ms Baxter—I thought that is what we were going to provide you with.

Senator CASH—That is greatly appreciated. Are you able to give examples of where a worker who injures themselves in an off-site recess break will not be eligible for compensation under this amendment?

Ms Baxter—I guess the example that I cited a few moments ago—where someone wilfully goes out and consumes alcohol at lunchtime to the degree that their judgment and abilities are impaired, incurring an injury that way—may on the facts, depending on all of the facts of the situation, be an example of that situation.

Senator CASH—So that would be a reliance upon section 14 of the current act.

Ms Baxter—That is right. I stress, though, that that would be based on a case-by-case basis depending on the facts of each case.

Senator CASH—How many claims relating to off-site recess injuries have been made since 2007? This is bearing in mind that I know they are currently excluded. Do you have statistics in relation to claims that have been made?

Ms Baxter—We have no statistics in relation to that. My advice is that no claims have been made.

Senator CASH—No claims in relation to off-site recess injuries have been made since 2007?

Ms Baxter—That is the advice I have.

Senator CASH—Where did that advice come from? Is it something that we need to explore further?

Ms Baxter—That is advice from colleagues at Comcare, who would be in a position to have that data.

Senator CASH—Then my next question—how many of these were accepted or rejected—is redundant based on the information that you have given me. Under the current status of the law, what options does an employee have if they were injured during an off-site recess break? If I am not insured under the Comcare scheme, what options are available for me to pursue?

Ms Baxter—If you were such an employee you could, I suppose, look to whether or not there were some sort of insurance. Depending on the nature of the injury suffered, some third-part insurance—potentially, if it were a car accident, CTP—

Senator CASH—Public liability or anything like that, common law if there were a process I could go through there—

Ms Baxter—That is correct, if it were open to you.

CHAIR—I have one question. How many self-inflicted injuries then result in claims being made to Comcare?

Ms Baxter—I am advised we will need to take that on notice to get the information to you.

CHAIR—Are there any?

Ms Baxter—We are not aware of any.

CHAIR—I assume that if you are not aware of any that it is not a regular occurrence that workers are out there inflicting injuries upon themselves in order to go on measly compensation payments, because that would be a good outcome for everybody.

Ms Baxter—I would think not, no.

CHAIR—I want to go to the CRF drawings. You said in your submission and, I think, your written submission, too, that you are unable to identify the actual amount that is owed to the Commonwealth. Am I correct that that is what you said?

Ms Baxter—That is right.

CHAIR—At some point we have to determine an amount, do we not, in order to reconcile those two things—or have I missed what you are actually doing? If I have missed that, can you explain to me again how we do that reconciliation without knowing a number?

Mr Lis—The way in which the reconciliation works is that the Commonwealth is required to recover any payments that are made unauthorised, but the legislation then creates an entitlement for Comcare in relation to any amounts that it has been paid. Those two amounts are then set off. It is a one-off notional transaction that, in effect, does not require strict identification of the amounts paid.

CHAIR—So no money is going to change hands in this process; it simply balances an unbalanced provision left over from years past.

Mr Lis—That is right. The money has been paid unlawfully, and as a result—

CHAIR—Then how come we do not know how much?

Mr Lis—The standing appropriation deals with a range of pre-premium liabilities, and the particular class affected by this is just one class of that. I think Comcare can identify the amount of pre-premium liabilities that have been paid, but to identify this particular class would involve assessing every single claim and disaggregating it.

CHAIR—So it is really just a paper process to satisfy an accountancy requirement.

Mr Lis—And to satisfy a constitutional requirement.

CHAIR—There is that as well. Okay. So money does not change hands. We talk about diseases with long latency periods and how we are going to make provisions for them. Asbestos related diseases jump to mind. What other sorts of diseases for which we need to make provision come into this category of long latency periods? Do you have a feel for that?

Mr Lis—I am advised that chemical toxicity and exposure to chemicals is an issue. Potentially sun exposure is an issue. Essentially, the principle at play here is that it is a disease that is not diagnosed until after a particular date but the relationship to work and the actual exposure to those conditions predated that particular date.

CHAIR—I understand that. I am just trying to get a feel for it. We are well aware that we have not yet reached the peak of asbestos related diseases from exposure that may have occurred some 30 years ago. Of course, that is quite well known publicly. What I am trying to get a feel for is whether there is another type of disease that is now building up where, statistically, we are going to have an equivalent to an asbestos type situation. Or is this just more of a general provision and so there are bits and pieces across the board?

Ms Carapellucci—Asbestos related diseases would probably represent the bulk of diseases in this category. They are the ones that we are aware of, but there may be others that come out in the future that we are not aware of now.

CHAIR—So we are not aware of anything like asbestos happening now that we are making provision for at this point in time? We are just making provision generally, knowing that we are going to come across some diseases that are work related with long latency periods.

Mr Lis—That is right.

CHAIR—So it is an accounting type of provision rather than a specific medically driven provision being made—if you understand the difference I am trying to make.

Ms Carapellucci—Yes.

Senator CASH—I have just been flicking through the department's report. I have one additional question in relation to the off-site recess breaks. In recommendation 13 the department says:

- claims arising from injuries sustained during travel to and from work and off-site recess breaks, continue to be excluded.

Can I ask upon what basis that recommendation was made by the department?

Ms Carapellucci—The basis for the recommendation is set out in the department's report.

Senator CASH—Pages 24 and 25.

CHAIR—Is the department actually looking for an answer or have we just got into a position where we are all just waiting here for something to happen?

Ms Baxter—Ms Carapellucci's answer was: 'The department's reasoning was contained in the report.'

CHAIR—Everyone was still looking down at their papers.

Ms Baxter—I beg your pardon.

Senator CASH—I did not hear that.

CHAIR—Sorry, Senator Cash. I think we are due for you to ask another question.

Senator BACK—What was the answer?

Senator CASH—Could I get the witnesses to expand upon that because I cannot see the reasoning in the report.

Ms Carapellucci—It is probably fair to say that the report focuses more on journey claims than on off-site recess breaks and, in a way, lumps the two together.

Senator CASH—What was the basis for the recommendation, particularly in relation to the fact that off-site recess breaks continue to be excluded?

Ms Carapellucci—It is set out in paragraphs 4.24 and 4.25 of the department's report. It goes to that issue of control.

Senator CASH—Thank you. That is, paragraphs 4.24 and 4.25, relating back to the evidence given by the Productivity Commission?

Ms Carapellucci—Yes.

Senator CASH—Chair, I would not mind canvassing the time limit issue, as opposed to the medical expenses.

CHAIR—Sure.

Senator CASH—Listening to the answers given by the department in relation to the processes that employers—for example, Comcare or self-insurers—would need to undertake in determining whether section 14 applies, whether compensation should be paid, one issue that would appear to arise in relation to the inclusion of section 61(1) is how will this work in conjunction with Comcare/self-insurers processes of factual and medical reviews prior to determination of claims and, more particularly, in relation to high-impact claims such as stress, carpal tunnel, tendonitis, which actually take some time to work out whether a claim actually exists? Bear in mind that we obviously do not have a time period. I understand that one issue you raised upfront in your opening submission was the length of the proposed time limit and the fact that we do not know what it is because it will be set out in the regulations.

Ms Carapellucci—Again, the introduction of time limits was based on one of the themes that arose out of the Comcare review that related to the length of time that it took to process claims.

Senator CASH—What was that length of time?

Ms Carapellucci—For the period 2008-09 the average time taken to determine new injury claims by Comcare was 24 days and the average time taken to determine new disease claims by Comcare was 65 days.

Senator CASH—Just for the record, what falls within the definition of a 'new disease'? Is that more of a high-impact claim—for example, stress?

Ms Carapellucci—Yes, stress would fall within the category of disease.

Ms Baxter—Section 5B of the SRC Act provides a definition of disease.

CHAIR—Do we have the equivalent timing for self-insurance?

Ms Carapellucci—For self insurers, the average time to determine new injury claims, again for the 2008-09 period, was nine days and the average time to determine new disease claims was 21 days. So for the scheme as a whole the average times were 13 days for injury claims and 46 days for disease claims.

Senator CASH—Do you know if there is any thinking surrounding whether or not a distinction will be made between a time limit to determine a new injury claim and a time limit to determine a new disease claim? There would seem to be a significant difference in the process that needs to be undertaken by Comcare and the self insurer to determine each claim.

Ms Carapellucci—Yes, that is what the department flagged in its report on the Comcare review.

Senator CASH—Have you had any feedback from self-insurers on the potential impact on them of the introduction of a statutory period to determine claims and how they say it would affect their claim process?

Ms Carapellucci—The only one that we are aware of is the public submission by K&S Freighters.

Senator BACK—The one we have here.

Senator CASH—So at this stage we have a recommendation that there be at least two types of statutory time periods. Do we have any indication of what is being taken into account for each of those time periods or when they are actually put under the regulation or prescribed by the regulations?

Ms Carapellucci—I am not sure I quite understand the question.

Senator CASH—What process is being undertaken by the department to work out at an appropriate time frame for each time frame prescribed by the regulations, firstly, for the determination of a new injury and, secondly, for the determination of a new disease?

Ms Carapellucci—The department has been working closely with Comcare on matters such as the current scheme targets, and also bearing in mind the concerns about the length of time that is currently being taken, with a view to recommending time frames that would be both realistic in relation to the nature of the matter that needs to be determined and lead to an improvement in the performance of the scheme.

Senator CASH—That really is the nub of it—the realistic time frame. In particular, for example, in relation to the high impact claims—

Ms Carapellucci—Yes. There is certainly a recognition that the disease claims are generally more complex to determine and there is a range of evidence and so on that needs to be collected in order to properly determine those claims.

Senator CASH—Okay. Chair, that concludes my questions on this issue. Do either you or Senator Back have questions in relation to that particular issue before I move on?

Senator BACK—No, I am happy with that.

CHAIR—We will keep moving, then.

Senator CASH—I turn now to the payment of medical expenses. The bill will limit the suspension to weekly benefits only and not medical expenses. Could you take me through the rationale for this provision?

Ms Carapellucci—The rationale is to ensure that you do not have the unintended consequence of delaying a person's recovery because their access to medical treatment has been cut off.

Senator CASH—Yes.

Ms Carapellucci—So it would enable a person to be sanctioned, if you like, for, I suppose, not delivering on their side of the bargain in terms of the rehabilitation process. That sanction is in the form of suspending the weekly benefits, but they can continue to access the required medical treatment to facilitate their recovery.

Senator CASH—Okay. In terms of, for example, section 37 of the act and the reference to 'reasonable excuse', what is the definition of a 'reasonable excuse'?

Ms Baxter—There is no definition of 'reasonable excuse' in the act.

Senator CASH—Can you take me through, then, what is the understanding based on claims that have been made? For example, if this would assist you, are there any guidelines as to what is a reasonable excuse?

Ms Baxter—I am not sure whether there are guidelines. I will just refer the question to my—

Senator CASH—If you could take that on notice, that would be great.

Ms Baxter—If I may, yes, although I might just say that, again, this will be one of those situations where 'reasonable excuse' will be determined by case law. There would be a body of case law around it which Comcare would be aware of, and we can provide you with some examples if that would assist.

Senator CASH—That would be greatly appreciated.

Ms Baxter—I will take that on notice if I may.

Senator CASH—Could you also, in doing that, take this on notice just for clarification: what is the process used to determine whether a reasonable excuse has or has not been provided?

Ms Baxter—Yes, we will take that on notice.

Senator CASH—Thank you. In terms of the provision on payment of medical expenses, do the laws of other states or territories contain a similar provision? If so, which ones?

Ms Baxter—I think that may be variable, and we would need to take that on notice and provide you with the information.

Senator CASH—Thank you very much. How many claims have been suspended under the existing provision?

CHAIR—Just before we go on—I will get you to ask that question again—there is an issue in relation to taking questions on notice. Some of the questions that have been taken on notice probably will not take very long to get, but it just occurs to me that that last question, in particular, sounds like quite a substantial body of work—going through all the state legislation stuff. We have our report to table and, if the answers are not going to come back until after we have tabled the report, I question whether we still want the department to find those answers. I just draw your attention to that, because we do not want the department doing lots of work well after the time when that information is completely redundant to us.

Senator CASH—Thank you for that, Chair. In terms of ‘reasonable excuse’, I ask the department to get me whatever information they can to enable us to consider our report. Then I can say that basically, once we have done that, no further information is required based on what is provided to me. If there is anything at hand that the department can get—say, within the next 24 to 48 hours—that would be appreciated.

CHAIR—Thank you, Senator Cash. I was interrupting your last question, so you probably need to re-ask that.

Senator CASH—Not a problem at all. It was a statistical question: how many claims have been suspended under the existing provisions?

Ms Carapellucci—Comcare has advised that the number of people who have their compensation suspended is a few dozen every year and that the period of time for which benefits are suspended varies from one claim to another.

Senator CASH—Okay. That was actually my next question: what is the average time period for a suspension? Is that information readily accessible, and could you provide that to me, if required, on notice within the next day or two?

Ms Carapellucci—Yes, we will try to do that.

Senator CASH—And in terms of self-insurers? Do you have the statistics for self-insurers?

Ms Carapellucci—No, we do not, and it would probably take quite a while to get that information from self-insurers.

Senator CASH—Okay, that is fine. What is the cost to the Commonwealth of the provision?

Ms Carapellucci—The cost is difficult to quantify because where an employee currently has their benefits suspended they are not required to provide Comcare with records of any medical expenses that they might have incurred during that suspension period.

Senator CASH—Okay.

Ms Carapellucci—But, given the small number of individuals involved, our view is that the cost would be quite small.

Senator CASH—Okay. Just in terms of the proposed provision and if the bill does go through: how does this provision in relation to the suspension of the weekly benefits only and not the medical expenses affect existing claims? Will there be any retrospectivity? What process will be undertaken?

Ms Carapellucci—It is not intended that the provision operate retrospectively.

Senator CASH—Okay. So, in terms of the commencement date of the bill—if it were to go through—it would only accept claims made as at the date of the commencement of the actual amendments to the legislation?

Ms Carapellucci—It will apply to existing claims, but it will only apply to circumstances where compensation is suspended following the commencement date of the bill.

Senator CASH—So, if I have got an existing claim at this present point in time which has been determined and I am currently suspended in relation to both weekly benefits and medical expenses, that will not be affected. However, if I have an existing claim and it has not been determined whether I will get a suspension, and that determination is made the day following the commencement of the bill, I will fall into the new provisions. Is that a correct understanding?

Ms Carapellucci—I am not sure about the situation where a suspension period straddles the commencement date of the bill. My understanding from discussions with Comcare is that generally the

suspension periods are relatively short; they are in the nature of one to two weeks. Also, the numbers are relatively small; it would be more a matter of if there were suspensions on foot. I guess we will need to get legal advice about how those particular ones would operate. But in the main it would be that these new provisions would apply to new cases where a person's benefits are suspended following the commencement of the bill.

Ms Baxter—The other thing to note in relation to the provision in the bill is that it is of a beneficial nature to claimants.

Senator CASH—Yes.

Ms Baxter—It is actually providing a benefit.

Senator CASH—I do understand that, but there is no intention for retrospectivity for this actual provision?

Ms Baxter—In terms of the operation of it?

Senator CASH—Correct.

Ms Baxter—No.

Mr Lis—Can I just add something? I have just had a quick look at the provisions now and my understanding is that it would actually operate by reference to when the medical expenses were actually incurred. In effect—

Senator CASH—Could you take me through that further?

Mr Lis—If someone is suspended at the time of the legislation coming into effect, and that person subsequently incurs medical expenses, the suspension would not operate to prevent payment of those medical expenses.

Senator CASH—Thank you very much.

CHAIR—That probably does wrap us up then. Senator Back, do you have any further questions?

Senator BACK—I do not, but I was appreciative of the discussion.

CHAIR—I will make a couple of observations again in terms of questions on notice. I simply ask the department to try and get those answers to the committee as soon as possible. We need to start drafting the report over the weekend in order to meet our own deadlines. Please try to advise the secretariat by close of business Friday which answers you can or cannot get and we will convey that back to the senators who have asked them and find out whether that is going to be a major problem for them. Thank you for your submission and your presentation to the committee today.

Committee adjourned at 11.10 am