The Senate

Education and Employment Legislation Committee

Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 [Provisions]

July 2014

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CHAPTER 1

Reference

1.1 On 19 March 2014 the Hon. Christopher Pyne MP introduced the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (bill) in the House of Representatives.[1] On 15 May 2014 the Senate referred the provisions of the bill to the Senate Education and Employment Legislation Committee (committee) for inquiry and report by 8 July 2014.[2]

Conduct of inquiry

1.2 Details of the inquiry were made available on the committee's website.[3] The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 18 organisations, as detailed in Appendix 1.

1.3 A public hearing was held in Canberra on 20 June 2014. The witness list for the hearing is available in Appendix 2.

Background

1.4 The Productivity Commission's 2004 *Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks* recommended that a national workers' compensation scheme be developed to operate in parallel to existing state and territory schemes. Specifically, it suggested the following steps be taken:

> step 1 – immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme, subject to meeting its prudential, claims management, occupational, health and safety and other requirements; step 2 – commence, at the same time, the development of an alternative self-insurance scheme for corporate employers who wish to join such a scheme, and who meet prudential, claims management and other requirements.[4]

1.5 In 2007 the previous government placed a moratorium on new applications for declarations of eligibility from private sector corporations seeking self-insurance under the Comcare scheme.[5]

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1 *Votes and Proceedings*, 19 March 2014, p. 389.

2 *Journals of the Senate*, 15 May 2014, p. 819.

3 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Safety_Rehabilitation_and_Compensation_Legislation_Amendment_Bill_2014 (accessed 6 June 2014).

4 Productivity Commission Inquiry Report No 27, March 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, pp XL– XLI.

5 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. v.

1.6 With respect to group employer licences, the Department of Education, Employment and Workplace Relations 2008 *Review of Self-insurance arrangements under the Comcare scheme* recommended that:

> …[t]he Safety, Rehabilitation and Compensation Act be amended so that… corporations forming part of a group of related corporations are able to be assessed as a group…; and the Safety, Rehabilitation and Compensation Act be amended to enable the Safety Rehabilitation and Compensation Commission to grant a group licence to a related eligible corporation.[6]

1.7 Most recently, the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) *Review* by Dr Allan Hawke AC, commissioned by the former government in 2012 (*Hawke Review*), recommended that the 'moratorium and competition test should be lifted, allowing national employers to join the Comcare scheme.'[7] Further, it recommended that:

> …[t]he SRC Act should be amended to allow the Commission to grant group licences to companies of licenced self-insurers with more than one entity, subject to satisfying all prudential requirements, in order to reduce administrative costs for scheme participation….[8]

The *Hawke Review* concluded that removing the competition test would:

> …[a]ssist in reducing red tape, while broadening the Comcare scheme to allow a national approach for employers who satisfy the associated set of criteria and would build on the national disability strategy and approach.[9]

1.8 On 2 December 2013 the current government lifted the moratorium.[10]

1.9 The bill seeks to implement the recommendations of the *Hawke Review*,[11] and implement government commitments with respect to building a stronger and more

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6 Australian Government, Department of Education, Employment and Workplace Relations, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, p. 7. On 18 September 2013 the Department of Education and the Department of Employment was created out of the former Department of Education, Employment and Workplace Relations.

7 Australian Government, Department of Employment, Allan Hawke AC, *Safety Rehabilitation and Compensation Act Review: Report of the Comcare Scheme's Performance, Governance and Financial Framework*, 7 December 2012, p. 3.

8 Australian Government, Department of Employment, Allan Hawke AC, *Safety Rehabilitation and Compensation Act Review: Report of the Comcare Scheme's Performance, Governance and Financial Framework*, 7 December 2012, p. 3.

9 Australian Government, Department of Employment, Allan Hawke AC, *Safety Rehabilitation and Compensation Act Review: Report of the Comcare Scheme's Performance, Governance and Financial Framework*, 7 December 2012, p. 34.

10 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. v.

11 Explanatory Memorandum, *Safety Rehabilitation and Compensation Bill 2014*, p. i.

prosperous economy. Specifically, it seeks to reduce the regulatory impact on the economy by $32.8 million each year for the next 10 years.[12]

1.10 The bill also proposes to respond to community expectations concerning personal accountability.[13]

Overview of the bill

1.11 The bill proposes to amend the SRC Act and the *Work Health Safety Act 2011* (WHS Act). The proposed amendments would:

- remove the requirement for the Minister for Employment (Minister) to declare a corporation to be eligible to be granted a licence for self-insurance, while retaining the ability for the Minister to give direction to the Safety, Rehabilitation and Compensation Commission (Commission);
- enable corporations currently required to meet workers' compensation obligations under two or more workers' compensation laws of a state or territory to apply to the Commission for approval to be a self-insurer in the Comcare scheme;
- allow a former Commonwealth authority to apply directly to the Commission for approval to be a self-insurer in the Comcare scheme and be granted a group licence if the authority meets the 'national employer' test;
- enable the Commission to grant 'group employer licenses' to related corporations;
- make consequential changes to extend the coverage provisions of the WHS Act to those corporations that obtain a licence to self-insure under the SRC Act; and
- exclude access to workers' compensation where: (i) a person engages in serious and wilful misconduct even if the injury results in death or serious and permanent impairment; or (ii) injuries occur during recess breaks away from an employer's premises; or (iii) injuries are sustained because a person voluntarily and unreasonably submitted to an abnormal risk of injury.[14]

12 Explanatory Memorandum, *Safety Rehabilitation and Compensation Bill 2014*, p. i.

13 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. 45.

14 Explanatory Memorandum, *Safety Rehabilitation and Compensation Bill 2014*, pp i–ii.

Structure of the bill

1.12 The bill is comprised of five schedules.

Schedule 1	national employers
Schedule 2	group employer licences
Schedule 3	injury caused by misconduct
Schedule 4	recess in employment abnormal risk of injury
Schedule 5	technical provisions

Schedule 1: national employers

1.13 Schedule 1 proposes to introduce a 'national employer' test for licence eligibility and remove the requirement for the Minister to make a declaration before a licence application can be made. The 'national employer' test replaces the current requirement that in order to obtain a licence under the SRC Act a corporation must be carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority. The 'national employer' test proposes that a corporation that has employer obligations in two or more Australian jurisdictions would classify as a national employer, and therefore, assuming it satisfies the other requirements of the SRC Act, could obtain a licence under the SRC Act, bringing all of its employees under a single workers' compensation jurisdiction.[15]

1.14 Schedule 1 also sets out terms to ensure that employers who are granted a licence under the SRC Act are covered by the WHS Act.[16]

Schedule 2: group employer licences

1.15 Instead of requiring each corporation to apply for an individual licence, schedule 2 proposes to introduce a licensing scheme whereby one 'group employer licence' can be issued to a group of corporations which are related bodies corporate.[17]

15 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, pp 1–7.

16 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, pp 1–7.

17 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, pp 8–43.

Schedule 3: injury caused by misconduct

1.16 Schedule 3 proposes to remove eligibility for workers' compensation where an injury results in death or serious and permanent impairment that is caused by the serious and wilful misconduct of the employee.[18]

Schedule 4: recess in employment

1.17 Schedule 4 proposes to remove eligibility for workers' compensation where an injury is sustained by the employee while the employee was not at their place of work during a recess break.[19]

1.18 Schedule 4 also proposes to remove eligibility for workers' compensation where an injury is sustained by the employee because he or she voluntarily and unreasonably submitted to an abnormal risk of injury.[20]

Schedule 5: technical provisions

1.19 Schedule 5 proposes to make technical amendments only.[21]

Human rights implications

1.20 The explanatory memorandum details the bill's engagement of numerous human rights instruments:

- the right to social security, including social insurance, under Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESR);
- the right to safe and healthy working conditions, under Article 7 of ICESR;
- the right to privacy, under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR);
- the right to work, under Article 6 of ICESR, in particular the rights of persons with disabilities to habilitation and rehabilitation and to work and employment, under Articles 26 and 27 of the *Convention on the Rights of Persons with Disabilities* (CRDP), respectively.[22]

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18 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. 44.

19 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, pp 45–46.

20 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, pp 45–46; *Safety Rehabilitation and Compensation Act 1968*, s. 6(3).

21 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. 47.

22 Explanatory Memorandum, *Safety Rehabilitation and Compensation Bill 2014*, at Statement of Compatibility, p. ii.

1.21 The explanatory memorandum states that the bill is compatible with human rights because it advances the protection of human rights. Further it argues:

> To the extent that the amendments may limit human rights, those limitations are reasonable, necessary and proportionate.[23]

Financial Impact Statement

1.22 The Department of Employment has not provided a Financial Impact Statement.

Acknowledgement

1.23 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

Notes on references

1.24 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the Proof Hansard and the official transcripts.

23 Explanatory Memorandum, *Safety Rehabilitation and Compensation Bill 2014*, at Statement of Compatibility, p. vi.

CHAPTER 2

Key Issues

2.1 The bill received a mixed response from submitters and witnesses.

2.2 All submitters were generally supportive of the establishment of nationally consistent workers' compensation standards. Some submitters voiced concerns that the Comcare scheme was not equipped to manage the occupational work health and safety risks of an increased workload,[1] and that the bill would reduce the rights and entitlements of Australian workers.[2]

2.3 Broadly speaking, concerns brought to the committee's attention centred on eligibility to the Comcare scheme and exclusions of access to workers' compensation.

2.4 In this chapter the committee addresses stakeholder concerns and outlines its views.

Eligibility to the Comcare scheme

2.5 The amendments under schedules 1 and 2 of the bill would operate to expand the Comcare scheme and provide greater consistency with respect to workers' compensation across Australia.

2.6 The amendments under schedule 1 would amend the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) to remove the 'competition test' and introduce a 'national employer' test for licence eligibility.[3] Under the current 'competition test' eligibility to join the Comcare scheme is confined to Commonwealth authorities, privatised Commonwealth authorities and corporations in competition with either.[4] Under the proposed 'national employer' test a corporation that has employer obligations in two or more Australian jurisdictions, assuming it satisfies the other requirements of the SRC Act, could obtain a licence under the SRC Act, bringing all of its employees under a single workers' compensation jurisdiction.[5]

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1 Community and Public Sector Union, *Submission 5*, p. 8; CFMEU Mining and Energy, *Submission 2*, p. 1; Australian Lawyers Alliance, *Submission 15*, p. 7.

2 CFEMU Mining and Energy, *Submission 2*; Australian Manufacturing Workers' Union, *Submission 4*; Community Public Sector Union, *Submission 5*; Slater & Gordon Lawyers, *Submission 8*; Australian Council of Trade Unions, *Submission 13*; Law Council of Australia, *Submission* 14; Australian Lawyers Alliance, *Submission 15*.

3 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, ss. 4(1).

4 Slater & Gordon Lawyers, *Submission 8*, p. 4.

5 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, pp 1–7.

2.7 The amendments under schedule 2 would amend the SRC Act to allow 'group employer licences' to be granted where at least one corporation in a group of corporations is a 'national employer.'[6] The introduction of 'group employer licences' will reduce red tape and costs for Australian corporations and 'recognises that groups of interrelated corporations often share return-to-work and work health and safety systems within the group.'[7]

The expansion of the Comcare scheme

2.8 Some submitters objected to schedules 1 and 2 of the bill, submitting that harmonisation of the state and territory schemes is a better approach to a national scheme, as opposed to the expansion of the Comcare scheme.[8]

2.9 Many submitters expressed serious concerns about the potential expansion of the Comcare scheme as a result of the 'national employer' test.[9] Some submitters raised reservations about the definition of 'national employer' not setting a minimum number of employees required in an Australian jurisdiction for self-insurer eligibility purposes.[10] The Australian Council of Trade Unions (ACTU) also argued that: '[g]roup licences are of particular concern as small employers, are, in general, not particularly equipped to administer a self-insurance scheme.'[11]

2.10 Other submitters registered strong support for the introduction of the 'national employer' test.[12] The National Electrical and Communications Association (NECA) submitted that:

> the requirements of various jurisdictions not only significantly cost businesses many additional thousands of dollars when compared with a single national scheme, but additionally that multi state jurisdiction led to serious inequities for employee compensation within the same organisation across different state legislations.[13]

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6 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, ss. 4(1).

7 The Hon. Christopher Pyne, MP, Minister for Education, *House of Representatives Hansard*, 19 March 2014, p. 2381.

8 Slater & Gordon Lawyers, *Submission 8*, p. 5; Law Council of Australia, *Submission 14*.

9 Queensland Council of Unions, *Submission* 1, pp 3–4; Australian Manufacturing Workers' Union, *Submission 4*, p. 4; Community and Public Sector Union, *Submission 5*, pp 7–8; Shop, Distributive and Allied Employees' Association, *Submission 7*, p. 4; Slater & Gordon Lawyers, *Submission 8*, pp 5–8; Australian Council of Trade Unions, *Submission 13*, pp 8–10; Law Council of Australia, *Submission 14*, p. 3; Australian Lawyers Alliance, *Submission 15*, pp 6–7.

10 Australian Council of Trade Unions, *Submission 13*, p. 9; Slater & Gordon Lawyers, *Submission 8*, p. 5.

11 Australian Council of Trade Unions, *Submission 13*, p. 9.

12 Australian Chamber of Commerce and Industry, *Submission 10*, p. 1; National Electrical and Communications Association, *Submission 9*, p. 3.

13 National Electrical and Communications Association, *Submission 9*, p. 3.

2.11 The Department of Education's (department) rationale for opening up the Comcare scheme is to reduce compliance costs around processes.

> If you are a national employer, the Productivity Commission said that it would cost you millions of dollars if you are trying to comply with six different workers compensation schemes. The administrative costs of that were very expensive. So it reduces costs but it is also about efficiency.[14]

2.12 Similarly, the Australian Chamber of Commerce and Industry (ACCI) emphasised how the proposed 'national employer' test would provide employers operating in multiple states the opportunity to adopt a national approach to the management of workers' compensation in their businesses.[15] Comcare argued that 'national companies outside the Comcare scheme have to navigate the complexity of fragmented state and territory regulatory and insurance systems,' whereas workers under the Comcare scheme 'have common coverage and entitlements regardless of where they live or work within Australia.'[16]

> **[**A]t the moment a worker can get injured in one state and get different compensation, yet a worker with exactly the same injury in another state will get a different arrangement. So at the moment a worker can get different benefits, different step-downs, but still have exactly the same injury. So there is some inequity in that.[17]

Impact on state and territory workers' compensation schemes

2.13 Although generally supportive of a nationally consistent workers' compensation scheme, a number of submitters brought to the committee's attention concerns about the ramifications of the expansion of Comcare on state and territory workers' compensation schemes.[18]

2.14 Some submitters commented on the need for actuarial analysis to be undertaken of the impact of the bill on the premium pool.[19] Specifically, the Queensland government took the view that until detail on the scope of the proposed 'national employer' test is provided, meaningful actuarial analysis on the bill could not be undertaken.[20] The Regulation Impact Statement (RIS) notes that actuarial assessments were conducted for the Australian government Productivity

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14 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Estimates transcript of evidence*, 3 June 2014, p. 118.

15 Australian Chamber of Commerce and Industry, *Submission 10*, p. 1.

16 Comcare, *Submission 11*, p. 3.

17 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Estimates transcript of evidence*, 3 June 2014, p. 118.

18 Australian Council of Trade Unions, *Submission 13*; Law Council of Australia, *Submission 14*.

19 Queensland Council of Unions, *Submission 1*; Law Council of Australia, *Submission 14*; Queensland Government, *Submission 17*.

20 Queensland Government, *Submission 17*, p. 11.

Commission's 2004 *Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks* and that minimal impact would be felt by state based schemes or remaining employers due to the exit of corporations from the state and territory schemes to the Comcare scheme.[21]

2.15 The Australian Manufacturing Workers' Union (AMWU) submitted that the proposed 'group employer licence' is open to far more employers than comparable state group licensees because of fewer financial requirements and the absence of any minimum number of employees.[22] The Community and Public Sector Union (CPSU) argued that by allowing entry to the Comcare scheme through group licences, small employers who do not meet the 'national employer' test could opt out of contributing to the relevant premium pool of workers' compensation.[23] The Law Council of Australia submitted that:

> A major concern is that the expansion of the SRC scheme will have ramifications for the financial viability of existing [s]tates and [t]erritory workers' compensation scheme… [t]he preferred approach is to adopt best practices from each jurisdiction in developing harmonising legislation, rather than simply enabling national employers to opt-out of state/territory schemes.[24]

2.16 The Queensland Council of Unions also expressed concerns that the departure of national employers from state or territory workers' compensation schemes would result in a weakening of the state scheme and potentially 'massive increases for state-based employers/and or the eventual removal of entitlements to injured workers to attempt to maintain the scheme viability.'[25]

2.17 The department submitted that the 2008 *Taylor Fry Review* of self-insurance arrangements under the Comcare scheme concluded that there would be minimal impacts on state workers' compensation schemes if private corporations were to join the Comcare scheme as self-insurers.[26] Specifically, the *Taylor Fry Review* concluded that:

> The prudential and financial requirements of licensees mean that the risk to premium payers or the Commonwealth is minimal… All the available evidence suggests that the actual impacts on the state and territory workers' compensation scheme of corporations exiting those schemes to join

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21 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xliii.

22 Australian Manufacturing Workers' Union, *Submission 4*, p. 5.

23 Community and Public Sector Union, *Submission 5*, p. 7.

24 Law Council of Australia, *Submission 14*, p. 3.

25 Queensland Council of Unions, *Submission 2*, p. 2.

26 Department of Education, Employment and Workplace Relations, Taylor Fry, *Review of self-insurance arrangements under the Comcare scheme*, 15 May 2008, p. 80.

> Comcare have been insignificant. The likelihood of future impacts being significant is low.[27]

2.18 Some submitters were concerned that the Comcare scheme offers fewer benefits than many state and territory workers' compensations schemes[28] and has inadequate dispute resolution processes.[29] The department advised that:

> The Commonwealth Work Health and Safety framework consisting of the Work Health and Safety Act, Regulations and Codes of Practice is based on the provisions of the Model Work Health and Safety Act and Regulations developed by all states and territory jurisdictions and peak union and employer organisations through Safe Work Australia.[30]

The capacity of Comcare

2.19 Some submitters argued Comcare lacked the capacity to monitor performance, regulate and hold to account self-insurers on a national basis, for example, where a self-insurer fails to meet return to work obligations.[31] In response, Comcare explained that on its assessment of applications for self-insurance licences, the Commission applies stringent standards and regularly monitors licensees' performance, with regard to such issues as:

> (a) the resources of the corporation applying for the licence…; (b) financial and prudential information…; (c) the claims management systems information of the corporation…; and (d) the past performance of the applicant corporation in complying with and conforming to applicable laws or statutory guidelines in relation to the health and safety of employees, rehabilitation of employees, premium payment and claims management obligations.[32]

2.20 In addition, the Department of Education, Employment and Workplace Relations 2009 *Comcare Review* found that:

> Overall, the Comcare scheme's approach to Work Health and Safety regulation was comparable with other Australian schemes. The provision of self-insurance licences to private sector corporations was not seen as placing them or their employees at a disadvantage.[33]

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27 Department of Education, Employment and Workplace Relations, Taylor Fry, *Review of self-insurance arrangements under the Comcare scheme,* 15 May 2008, p. 81.

28 Community and Public Sector Union, *Submission 5*, p. 8.

29 Finance Sector Union, *Submission 3*, p. 4.

30 Department of Employment, *Submission 6*, p. 4.

31 Australian Lawyers Alliance, *Submission 15*, p. 7.

32 Department of Employment, *Submission 6*, p. 7.

33 Comcare, *Submission 11*, p. 4.

2.21 A number of submissions argued that the Comcare scheme was not equipped to cover workers in industries outside of the Australian Public Service, for example, aged care, manufacturing or mining.[34] The department responded to this criticism by explaining that:

> The industry profile of the Comcare scheme is varied and covers the Australian Defence Force as well as 29 self-insurers who are private corporations across a range of industries including: construction; manufacturing; Financial and insurance services; Transport, postal and warehousing; and Information media and telecommunications.[35]

2.22 Further, Comcare explained that while aged care, the health industry and mining sectors are not currently in the Comcare jurisdiction, '[s]kills in this area will be acquired when/if companies in these fields enter the Comcare scheme.'[36]

Committee view

2.23 The committee notes that all submitters were generally supportive of the establishment of nationally consistent workers' compensation standards.

2.24 The committee recognises the submitter concerns outlined above. However, the committee notes that the proposed measures were carefully drafted after consultation and in response to a number of comprehensive reviews and inquiries.

2.25 While the committee recognises that Comcare will need to adjust and increase its workforce accordingly, it maintains that legislative change is still necessary to significantly reduce compliance costs, simplify processes and boost productivity and efficiency for businesses that operate and employ across multiple jurisdictions.

2.26 As the amendments implement the specific recommendations of a number of reviews and inquiries to remove the 'national employer test' and enable the Commission to grant 'group employer licenses', the committee can see no reason for the legislation to be delayed.

Exclusions of access to workers' compensation

2.27 The second key issue concerns exclusions of access to workers' compensation in three instances. The RIS identified that the exclusions of access to workers' compensation outlined in the bill respond to community expectations concerning personal accountability.[37] The government said that: '[i]n circumstances where a

34 Community and Public Sector Union, *Submission 5*, p. 8; CFMEU Mining and Energy, *Submission 2*, p. 1.

35 Department of Employment, *Submission 6*, p. 11.

36 Comcare, answer to questions on notice, 20 June 2014 (received 17 June 2014).

37 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xii.

claimant's injury is the result of their own serious and wilful misconduct, community expectations are that the injury would not be compensable.'[38]

2.28 Some submitters expressed concerns that these exclusions would result in injured workers receiving less workers' compensation payments than they would under their respective state or territory system.[39] Some witnesses also questioned the extent to which these provisions could apply to industries outside the Comcare scheme's current profile.[40]

Injury caused by misconduct

2.29 The amendment under schedule 3 would alter subsection 14(3) of the SRC Act by excluding access to workers' compensation where an employee sustains an injury that is caused by their own serious and wilful misconduct, even if the injury results in death or serious and permanent injury.[41] Specifically, this amendment is:

> geared towards people acting in a proper and safe manner and [does] not include a safety net for people who break the rules and put at risk not just themselves but other employees.[42]

2.30 It should be noted that the proposed amendment provides an exception in subsection 147(2) of the SRC Act for Australian Defence Force (ADF) members, such that they will continue to have access to workers' compensation where their own serious and wilful misconduct results in death or serious and permanent injury.[43]

2.31 A number of submissions pointed out that currently all Australian workers' compensation jurisdictions provide coverage where the employee sustains an injury that results in death or serious or permanent injury, even where the injury is thought to be caused by their own serious and wilful misconduct, providing the injury was not intentionally self-inflicted.[44]

2.32 Submitters and witnesses representing employees' rights disagreed with the proposed exclusion of access to workers compensation where an employee sustains an

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38 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xii.

39 Australian Manufacturing Workers' Union, *Submission 4*; Community Public Sector Union, *Submission 5*; Australian Council of Trade Unions, *Submission 13*; Law Council of Australia, *Submission 14*; Australian Lawyers Alliance, *Submission 15*.

40 CFEMU Mining and Energy, *Submission 2*; Slater & Gordon Lawyers, *Submission 8*; Australian Federal Police Association, *Submission 12.*

41 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, ss. 14(3).

42 The Hon. Christopher Pyne, MP, Minister for Education, *House of Representatives Hansard*, 19 March 2014, p. 2381.

43 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, ss. 147(2).

44 CFEMU Mining and Energy, *Submission 2*, p. 3; Slater & Gordon Lawyers, *Submission 8*, p. 5; Law Council of Australia, *Submission 14*, p. 4; Unions NSW, *Submission 16*, p. 8.

injury that is caused by their own serious and wilful misconduct, even if the injury results in death or serious and permanent injury.[45] They expressed concerns about its procedural fairness[46] and argued that it would shift the burdens and risks associated with employment further on to employees.[47] In evidence to the committee, Mr Trevor Clarke, Senior Industrial Officer of ACTU questioned 'how a deceased worker might meet the evidentiary burden of proving that the conduct that killed them was not wilful.'[48] The department's response to this concern is as follows:

> If an employee were to die at work, I do not think the employer could simply assert that it was caused by the employee's serious and wilful misconduct. Ordinarily, the dependents of the deceased person would stand to benefit from a claim under the employer's liability. It would only be if the employer could counter that claim by proving there had been serious and wilful misconduct that the deceased employee's dependents would miss out.
>
> …
>
> [t]he employer would have to adduce evidence of the serious and wilful misconduct. There would have to be visual, documentary or eyewitness evidence to say that the person was engaged in an activity that constituted serious and wilful misconduct …[49]

2.33 The Australian Federal Police Association (AFPA) argued that policing work exposes police employees to a significantly high risk, and that they should therefore be afforded the same protections provided to ADF members under the proposed subsection 147(2), such that they would continue to have access to compensation in cases where serious and wilful misconduct results in death or serious and permanent impairment.[50]

2.34 The department explained that the bill aims to respond to community expectations concerning personal accountability.[51] Further, in the 2014-2015 Budget Estimates public hearings, the Hon. Eric Abetz, Minister for Employment stated:

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45 Law Council of Australia, *Submission 14*, p. 5; Unions NSW, *Submission 16*, pp 4–5.

46 CFEMU Mining and Energy, *Submission 2*, p. 3; Finance Sector Union of Australia, *Submission 3*, p. 7; Australian Manufacturing Workers' Union, *Submission 4*, p. 6; Community Public Sector Union, *Submission 5*, p. 6; Slater & Gordon Lawyers, *Submission 8*, p. 5; Australian Council of Trade Unions, *Submission 13*, pp 13–14; Law Council of Australia, *Submission 14*, p. 5; Australian Lawyers Alliance, *Submission 15*, pp 8–9.

47 Australian Council of Trade Unions, *Submission 13*, p. 12.

48 Mr Trevor Clarke, Australian Council of Trade Unions, *Committee Hansard*, 20 June 2014, pp 24–25.

49 Ms Renee Leon, PSM, Secretary, Department of Employment, *Estimates transcript of evidence*, 3 June 2014, p. 25.

50 Australian Federal Police Association, *Submission 12*, p. 4.

51 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xii.

> From a government policy point of view, people do need to take responsibility for their own actions, and wilful and serious misconduct does have consequences that will have flow-on impacts… every extra claim on a workers compensation policy increases premiums, increases the cost of employing people and, as a result, mitigates against employment opportunities in this country.[52]

2.35 Mr Greg Pattison, Special Advisor Workplace Health, Safety and Compensation Policy, ACCI, supported the proposed exclusion under schedule 3. In explaining ACCI's position, Mr Pattison articulated how the current provision affected employers:

> It is one of the ongoing frustrations of employers generally that they feel they are being held accountable, liable – and in this case liable through the increase in their workers compensation costs – for the actions of employees after they have done all the right things: after they have trained them, provided them with instruction, direction, all those sorts of things, yet it still comes back on the employer. In their minds, it still comes back on them, because they have to pay additional premium as a consequence.[53]

Recess in employment

2.36 The Productivity Commission's 2004 *Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks* (2004 Productivity Commission Inquiry) recommended that: 'coverage for recess breaks and work-related events… be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events.'[54]

2.37 The amendment under schedule 4 proposes to remove entitlement to workers' compensation for injuries sustained when an employee is temporarily absent from the workplace during a recess.[55]

> The rationale is that employers undertake to keep their workplace safe for employees. That is the responsibility and duty of an employer. The workers compensation scheme is there so, if, despite the employer's best efforts, an injury occurs at work, the worker is nevertheless covered. But the employer does not have any control over the places an employee might go to when they leave the employer's place of work.[56]

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52 The Hon. Eric Abetz, Minister for Employment, *Estimates transcript of evidence*, 3 June 2014, p. 116.

53 Mr Greg Pattison, Special Advisor Workplace Health, Safety and Compensation Policy, ACCI, *Committee Hansard*, 3 June 2014, p. 11.

54 Productivity Commission Inquiry Report No 27, March 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, p. 187.

55 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, para. 6(1)(b).

56 Ms Renee Leon, PSM, Secretary, Department of Employment, *Estimates transcript of evidence*, 3 June 2014, p. 117.

2.38 The committee heard extensive evidence relating to the possible implications of this proposed amendment on workers. Issues were raised concerning situations where employees must travel between worksites during a recess, or where it is necessary for employees to leave work to obtain food or drink.[57] Specifically, some submitters argued that the proposed amendment failed to accommodate the obligations of police and emergency service workers.[58]

2.39 AFPA presented evidence at the hearing that during meal breaks Federal Police are considered to be on duty.

> With the recess breaks, or meal breaks, in the Federal Police you are actually paid during your meal breaks because you are actually still on duty. So you have a difficult situation there.
>
> I was going to ask you that question, actually, Mr Hunt-Sharman. That is, you really are not off duty, are you?
>
> No.
>
> So if you did go to a cafe across the road and somebody was holding the cafe up at the time you went in—or attempted to, stupidly, while you were there—you actually are on duty, aren't you?
>
> That is correct.
>
> I can well understand the issue with others who have come before us, but on the common sense principle I could never see an occasion in which somebody in your activity could ever actually have the charge laid against you, because you are on duty all the time.
>
> Yes, and of course you are there to protect life and property. That is your sworn oath as an officer of the Crown.[59]

2.40 Similarly, at the hearing Mr Wayne McAndrew, General Vice President of CFMEU Mining and Energy, explained that in the mining industry recess breaks are also considered part of work:

> [r]ecesses, or meal breaks as we more commonly call them in my industry, are covered as part of the work in any event. You are not off for a period of time; it is pretty hard to come out for a cup of coffee from three miles underground, for example. So it has always been part of their work, whether they worked seven, eight, nine or 12 hours.[60]

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57 CFMEU Mining and Energy, *Submission 2*, p. 3; Financial Sector Union of Australia, *Submission 3*, p. 6.

58 Slater & Gordon Lawyers, *Submission* 8; Australian Federal Police Association, *Submission* 12; Australian Lawyers Alliance, *Submission 15*.

59 Mr Jon Hunt-Sharman, Australian Federal Police Association, *Committee Hansard*, 20 June 2014, p. 27.

60 Mr Wayne McAndrew, CFMEU Mining and Energy, *Committee Hansard*, 20 June 2014, p. 28.

2.41 The 2009 Department of Education, Employment and Workplace Relations, *Report of the Review of Self-insurance arrangements under the Comcare Scheme* (2009 Department of Education Review) recommended that:'[c]laims arising from injuries sustained during travel to and from work and off-site recess breaks, continue to be excluded.'[61]

2.42 Further, the RIS outlines that the current scenario increases costs for employers as a result of the higher incidence of accepted claims.[62] The government contends that where the employer has no control over the activities of the employee or the environment in which the employee engages in such activities:

> the proper avenue for people to seek recompense for injuries under such circumstances is through the owner of the premises where the injury occurred, not through their employer who has no control over the matter.[63]

2.43 The committee notes that employees who suffer an injury away from their place of work whilst on a recess have other avenues of redress in those circumstances, for example through public liability and compulsory third party insurance schemes. An employee who suffers an injury away from work should seek compensation for their injury directly from the person or organisation who owed the duty of care, rather than from their own employer who has no responsibility for areas over which they have no control.

Abnormal risk of injury

2.44 The amendment under schedule 4 would also repeal and substitute subsection 6(3) of the SRC Act, such that employees who voluntarily and unreasonably submit to an abnormal risk of injury will be excluded from claiming workers' compensation for an injury sustained at their usual place of work.[64]

2.45 Submitters representing employees' rights did not support this amendment, emphasising the lack of protection it would provide for workers, particularly where an employee is asked to undertake a task by their employer and even though the employee understands that they are submitting themselves to an abnormal risk they must weigh that against disobeying the employer's instruction.[65] Witnesses at the hearing also provided testimony about the potential ramifications of this amendment

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61 Australian Government, Department of Education, Employment and Workplace Relations, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, p. 7.

62 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xi.

63 The Hon. Christopher Pyne, MP, Minister for Education, *House of Representatives Hansard*, 19 March 2014, p. 2381.

64 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, ss. 6(3).

65 Slate & Gordon Lawyers, *Submission 2*, p. 7.

on those who work in environments with a significantly higher exposure to risk, for example those working in the mining sector or the police force.[66]

2.46 The government states that the proposed amendment to subsection 6(3) is consequential to the proposed amendments to section 6(1)(b):

> Because subsection 6(1) will no longer apply to injuries sustained away from the place of work during recess break, the reference to an injury sustained at a place or during an ordinary recess is no longer required.[67]

Committee view

2.47 The committee notes a number of concerns raised by witnesses and submitters. However, the committee also notes that a number of the proposed amendments stem from recommendations made by the 2004 Productivity Commission Inquiry and the 2009 Department of Education Review.

2.48 The committee also notes that premiums for employers may disproportionately increase as a direct result of inappropriate access to workers' compensation schemes by employees who suffer injuries away from work.[68] It is the view of the committee that employees injured in these circumstances should claim compensation from the person or organisation that owed them the duty of care during a recess, rather than from their employer.

2.49 The committee is persuaded that, on balance, the legislative response is proportional and reasonable, such that the amendments would respond to community expectations and ensure that the high importance that is placed on adhering to work health and safety requirements is not demeaned by employee misconduct.

66 Mr Wayne McAndrew, CFMEU Mining and Energy, *Committee Hansard*, 20 June 2014, pp 22–23; Mr Rogan McMahon-Hogan, Australian Federal Police Association, *Committee Hansard*, 20 June 2014, pp 24–25.

67 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. 45.

68 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xi.

Recommendation 1

2.50 The committee recommends that the Senate pass the bill.

Senator Bridget McKenzie
Chair

LABOR SENATORS' DISSENTING REPORT

Introduction

1.1 The Labor Senators of the committee maintain that all workers have the right to a fair, just and equitable compensation system in the event of a workplace injury. We note that the Safety, Rehabilitation and Compensation Legislation Amendment (SRCA) bill 2014 (the bill) contains a range of amendments to the *Safety, Rehabilitation and Compensation Act 1988 and Work Health and Safety Act 2011* (the Acts) that will have a detrimental impact on this right for Australian workers.

1.2 Furthermore, we note that there exists no policy justification for expanding self-insurance under Comcare, as the amendments contained in the bill shift costs from workers' compensation schemes to the injured worker, and therefore eventually, the public health system.

1.3 The bill does not advance the positive amendments proposed by the Hanks Review, which would make the scheme fairer and more effective, and instead imposes the will of the current Government to reduce workers' rights and entitlements.

The amendments contained in the bill will fail to meet the Government's agenda of reducing 'red tape'

1.4 Labor Senators believe that 'red tape' is the current pejorative for any form of policy disliked by the Coalition Government. The bill has been caught up in an eradication of supposed red tape at the detriment of workers.

1.5 Claims of any reduction of 'red tape' fail to stand up to scrutiny. The Department of Employment failed to identify how the amendments to the bill would contribute to the reduction of 'red tape', or even once mentioning the reduction of red tape in either their submission or at the public hearing, failing to justify the claims of the Government.

1.6 As noted in the Australian Council of Trade Unions' Submission (Submission 13), "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,"[1] especially as it relates to claims where serious or wilful misconduct may be involved.

1.7 Examples were presented to the committee demonstrating circumstances that would certainly increase confusion for workers as to what jurisdiction they are covered under should they be injured in the workplace, which will be exacerbated by the expansion of Comcare and the further erosion of common law in work health and

1 Australian Council of Trade Unions (ACTU), *Submission 13*, p. 13.

safety laws. This could result in people on the same site being covered under multiple jurisdictions, which is in complete contradiction to the Government's claims that work health and safety regimes cause confusion for employees and these amendments would reduce that confusion.[2]

1.8 The Law Council of Australia gave evidence to this matter at the hearing, suggesting the amendment in fact increased the confusion in the case of an accident:

> Mr Redpath: Another concern we have is the inconsistencies in terms of entitlements as national employers perhaps join the scheme. When we last looked at this, in 2009, we saw that about 30 per cent of employees were employed by an employer that is in two or more states so that it is a significant portion of the workplace.
>
> There could be situations on multi-employer worksites, perhaps a resource worksite in the Kimberleys or a building development in Geelong or where there are a series of multiple employers where, say, a group of workers get injured as a result of negligence and some of the employees would be entitled to super negligence, some would be entitled to certain rights, others would be entitled to other rights, even though they are injured in exactly the same way, on the same site, in the same place.
>
> CHAIR: Is that because of who their employer is?
>
> Mr Redpath: Yes, the only difference would be, because you are employed by a national employer, you only have these rights, whereas this person is employed by a Victorian employer or a Western Australia employer and they enjoy the rights of the jurisdiction. That is particularly important as most work rights in terms of access to negligence, the common law, are really state directed. The state laws provide entitlements or whatever to that.
>
> Our view is that if this act goes ahead, we also ought to amend proposed sections 44 and 45 essentially to preserve the status quo—that is to say, we remove the prohibition on common law, but the common law rights should be those of the jurisdiction in which they are injured, so they are no better off than their fellow Victorian worker or their fellow Tasmanian worker who is injured in those—
>
> CHAIR: Because the incident occurs in the same location?
>
> Mr Redpath: If it all occurs in the same location, in terms of that access to common law they ought to be in exactly the same place as their fellow employees and it ought not to depend on the accident of employment or in fact the accident as to whether they are an employee of a national employer who has joined this scheme. We would say that is easy enough to do and that that would not create any greater detriment to licensees joining the scheme having to live with the law of the jurisdiction. That is an aspect of

2 *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xi.

> the legislative package that we do not think has been thought through. So it would require that amendment.[3]

1.9 The Regulation Impact Statement (RIS) released with the bill cites only minor savings for employers as the rationale for the bill, but the total cost of work-related injury and disease are spread across employers, workers and the community. Safe Work Australia estimates that:

(a) employers bear 5 per cent of the total cost – this includes loss of productivity from absent workers, recruitment and retraining costs and fines and penalties from breaches of

(b) work health and safety regulations, injured workers bear 74 per cent of the costs – costs include loss of current and future income and non-compensated medical expenses, and

(c) the community bears 21 per cent of the total cost – this includes social welfare payments, medical and health scheme costs and loss of potential output and revenue.[4]

1.10 It is the view of the Labor Senators of the committee that any shift enacted by these amendments would see the relatively small burden on employers transferred onto injured workers and the community.

It is not appropriate for Senators to consider the bill without detail of the extent of the legislation

1.11 The bill introduces a series of exclusions to the entitlements of injured workers covered under Comcare. It paves the way for further expansion of the scheme, lowering the threshold for private sector employers to enter the scheme following the lifting of a moratorium in December 2013, opening the way for private employers to leave state-based schemes.

1.12 Evidence presented at the hearing by Slater & Gordon, the Law Council of Australia, the ACTU and the CFMEU confirmed that the Department's consultations on the extent of proposed changes to Comcare are ongoing, the details of which has been disclosed under confidentiality to potential self-insurers and employers, but not to the Parliament. All noted parties also gave evidence confirming that although they had been in consultation with the Government, they were effectively gagged from discussing the proposals outlined in the consultations.

1.13 The Department admitted in the hearing that a 'second tranch' of amendments to the Act was currently under consultation with the Government and stakeholders,

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3 Mr Bill Redpath, Member, Personal Injuries and Compensation Committee, Law Council of Australia, *Proof Committee Hansard*, 20 June 2014, p. 2.

4 *The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community*: 2008-09, Safe Work Australia, Canberra, January 2012.

outside of the amendments contained in the bill,[5] and failed to provide answers to questions placed on notice regarding the extent of consultation or proposed amendments.[6]

1.14 Ms Parker of the Department also stated in the public hearing that a reduction in benefits and other additional exclusions from compensation for injured workers was currently being canvassed, but had failed to be costed prior to consultations.[7]

1.15 The Department also gave evidence that the Government was yet to hand down a decision as to whether the recommendations contained in the Government's Commission of Audit relating to the operation of Comcare would be implemented.

1.16 Labor Senators assert that it is an outrageous proposition for the Government to ask the Parliament to vote on a bill to widen the Comcare scheme without knowing the extent of the changes the Government is planning, especially given that the Government is already in active consultation of further amendment to the scheme.

The amendments undermine the workers' compensation scheme as a 'no fault' scheme

1.17 The amendments contained in the bill erode the concept of a no-fault workers compensation system by excluding compensation for all injuries alleged to be caused by the "serious and wilful misconduct of the employee".

1.18 Prior to the amendment, compensation for injuries caused by serious and wilful misconduct of the employee would be approved, assuming it was not intentionally self-inflicted, if the injury resulted in death, or serious and permanent impairment. No other workers' compensation jurisdiction contains such a clause.[8] Should the amendment be fulfilled the Commonwealth will be a cruel outlier.

1.19 Furthermore, this amendment stands in complete contradiction of the implementation of the National Disability Insurance Scheme (NDIS) and a National Injury Insurance Scheme (NIIS), which would allow injured workers excluded from Comcare benefits to apply for taxpayer funded NDIS for care and support services, shifting the burden from the employer back to the taxpayer.

1.20 Serious concern was raised in the hearing regarding the loss of the 'no fault' basis of workers' compensation, particularly where the injury causes death. In effect,

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5 Ms Sandra Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 20 June 2014, p. 40.

6 Department of Employment, Answers to Questions on Notice, 20 June 2014 (received 2 July 2014).

7 Ms Sandra Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 20 June 2014, p. 45

8 CFEMU Mining and Energy, *Submission 2*, p. 3; Slater & Gordon Lawyers, *Submission 8*, p. 5; Law Council of Australia, *Submission 14*, p. 4; Unions NSW, *Submission 16*, p. 8.

despite the characterisation of the misconduct as "wilful", where death has been caused, the deceased's actions should not be considered "wilful" without the victim having been able to provide an opportunity to respond to the claim.

1.21 The majority of submissions to the committee disagreed with the proposed amendments,[9] and argued the implications of this exclusion of access to workers' compensation where an employee sustains an injury that is caused by their own serious and wilful misconduct, even if the injury results in death or serious and permanent injury, arguing that such an amendment would shift the burden of proof on to the employee, their colleagues or their family.[10]

1.22 In a question on notice to Comcare, Labor Senators requested clarity about research that had been undertaken to justify such an amendment. Comcare's response demonstrated that they have no awareness about whether any of the claims previously accepted involved allegations of serious and wilful misconduct of the employee, as data is not collected. The response noted that:

> Comcare is not aware whether or not any of these claims have involved allegations of 'serious and wilful misconduct of the employee' as there is limited scheme wide data available regarding if any of these claims are subject to allegations of 'serious and wilful misconduct' given this exclusion under the Safety, Rehabilitation and Compensation Act has no application where the worker dies or is seriously or permanently impaired. Where there is an allegation of 'serious or wilful misconduct' and the injury results in death or serious or permanent impairment, the claim is accepted because the protection in subsection 14.3 of the Safety, Rehabilitation and Compensation Act applies.[11]

The amendments introduce increased risk to workers undertaking their duties as employees

Recess exclusion leaves workers at risk

1.23 When the SRCA was enacted in 1988, compensation was provided for workers who were absent from their workplace during ordinary recess breaks – i.e. a lunch break. In 2007, recess claims were removed from the scheme.[12] In 2011, they were re-instated.[13] The amendment under schedule 4 proposes to remove entitlement

9 Law Council of Australia, *Submission 14*; Unions NSW, *Submission 16*; CFEMU Mining and Energy, *Submission 2*; Finance Sector Union of Australia, *Submission 3;* p. 7; Australian Manufacturing Workers' Union, *Submission 4*; Community Public Sector Union, *Submission 5*; Slater & Gordon Lawyers, *Submission 8*; Australian Council of Trade Unions, *Submission 13*; Law Council of Australia, *Submission 14*; Australian Lawyers Alliance, *Submission 15*.

10 Australian Council of Trade Unions, *Submission 13*, p. 12; Mr Trevor Clarke, Australian Council of Trade Unions, *Senate Hansard*, 3 June 2014, pp 24–25.

11 Comcare, Answer to Questions on Notice, 20 June 2014 (received 17 June 2014). pp 5–6.

12 *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007.*

13 *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2011.*

to workers' compensation for injuries sustained when an employee is temporarily absent from the workplace during a recess.[14]

1.24 It is the view of the Coalition Senators of the committee that employees injured in these circumstances should claim compensation from the person or organisation that owed them the duty of care during a recess, rather than from their employer. Labor Senators stand in opposition to this matter, and note that this was not presented in evidence, in fact, there was evidence presented that claims during recess breaks were a small proportion of overall claims.[15]

1.25 The committee heard extensive evidence relating to the possible implications of this proposed amendment on workers. Issues were raised concerning situations where employees must travel between worksites during a recess, or where it is necessary for employees to leave work to obtain food or drink.[16] Specifically, some submitters argued that the proposed amendment failed to accommodate the obligations of police and emergency service workers.[17]

1.26 Labor Senators disagree with the majority committee view stated in section 2.48 of the majority report that "[It] is the view of the committee that employees injured in these circumstances should claim compensation from the person or organisation that owed them the duty of care during a recess, rather than from their employer." Recess breaks are part of almost every worker's employment, for if it were not for the worker's employment, the employee would be unlikely to take recess in the locations prescribed by their workplace, be it on site or off site, and as such recess breaks should be covered under every workers compensations scheme.

> We come to work but we organise our lives around work. We have a break for lunch. We go to the Post Office to pay a bill. We are there as part of our working day. There really ought not to be a difference in those circumstances where someone has a staff cafeteria or canteen and can say that they are still in the building and that they are still with the employer at that point, and circumstances where they cross the road to obtain a sandwich.[18]

14 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, para. 6(1)(b).

15 Mr Bill Redpath, Member, Personal Injuries and Compensation Committee, Law Council of Australia, *Proof Committee Hansard*, 20 June 2014, p. 2.

16 CFMEU Mining and Energy, *Submission 2*, p. 3; Financial Sector Union of Australia, *Submission 3*, p. 6.

17 Slater & Gordon Lawyers, *Submission 8*; Australian Federal Police Association, *Submission 12*; Australian Lawyers Alliance, *Submission 15*.

18 Mr Bill Redpath, Member, Personal Injuries and Compensation Committee, Law Council of Australia, *Proof Committee Hansard*, 20 June 2014, p. 3.

Abnormal risk of injury

1.27 The bill proposes to amend section 6(3) of the SRCA, which would extend the exclusion of injuries sustained whilst a worker is undertaking their usual duties, if they submit to an 'abnormal risk of injury'.[19]

1.28 There also exists no protection for workers who are persuaded to undertake tasks in a dangerous manner at the behest of their employer or manager. This makes young and inexperienced workers particularly vulnerable. Slater & Gordon presented situations where a worker may need to weigh up submitting themselves to abnormal risk against disobeying an order of a superior and risking their employment.[20]

> Another example might be—particularly in a situation where we are looking at casual workforces where you have somebody that really wants to ensure that they continue in their current job—where an employer asks a worker to do a certain task, which they feel is very dangerous, but they also feel that if they do not do it they might be sacked. They go ahead and do it, and in doing so they may well be excluded from liability.[21]

1.29 Labor Senators disagree that the legislative response with regard to abnormal risk of injury is proportional or reasonable. There is no definition provided for what would be considered an abnormal risk, therefore it is impossible to define what would constitute argument to allow a claim to be rejected on the basis that a worker voluntarily chose to undertake a task in a way that presented an abnormal risk of injury.

1.30 The RIS identified that the exclusions of access to workers' compensation outlined in the bill respond to community expectations concerning personal accountability.[22] Adherence to work health and safety requirements and employee misconduct do not always go hand in hand. This clause specifically targets young and inexperienced workers who will at times submit to an 'abnormal risk of injury' whilst undertaking their usual duties at the workplace under the direction of a superior, and Labor Senators failed to be convinced that any community expectation of personal accountability exists in such instances.

The amendments proposed are easily exploitable by employers

1.31 The bill seeks to amend section 100 of the SRCA by introducing a definition of a "national employer" for the purposes of licencing. Labor Senators were persuaded by evidence presented with the submissions from Slater & Gordon, The Law Council,

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19 Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, ss. 6(3).

20 Slater & Gordon Lawyers, *Submission 8*, p. 7.

21 Ms Rachel James, NSW General Manager, Slater & Gordon Lawyers, *Proof Committee Hansard*, 20 June 2014, p. 17.

22 Licensing and other immediate amendments under the *Safety, Rehabilitation and Compensation Act 1988*, Regulation Impact Statement, Department of Employment, February 2014, p. xii.

and the ACTU regarding the exploitable nature of these amendments. The proposed amendments significantly extend the ability of private sector employers to become self-insurers under Comcare. Labor Senators were not persuaded that this is appropriate.

1.32 State workers' compensation schemes are significantly more supportive of injured workers in key areas such as return to work, and as such achieve better outcomes for workers than Comcare.[23] This would result in private employers who wish to lower their costs utilising the Comcare scheme to the detriment of their work force.

1.33 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 in one state or territory. An example is a mining corporation whose location is in Western Australia, but who offers a Sydney office with one employee, to be determined as a National Employer.

1.34 The Government cites cost savings for companies as the rationale for allowing this, despite refusing to answer whether it is within Comcare's capacity to monitor and regulate these inexperienced self-insurers, or increase the limited powers and resources of the Administrative Appeals Tribunal (AAT).

1.35 Workers currently under state workers' compensation regimes will be disadvantaged by a loss of critical rights and the loss of common law protections. There is no requirement for employers to inform workers of their changing rights and entitlements, nor any education provided to workers about what these changes will mean for them.

1.36 Comcare provides little, and in most regions, no active health and safety monitoring. This will allow companies with a poor health and safety record, or with a high-risk workforce to avoid scrutiny at the detriment of workers. The Department failed to provide answers as to whether an increased health & safety inspectorate would be introduced, therefore Labor Senators assert this is unlikely.

1.37 Unlike other state schemes, the legislation provides no timeframes under which Comcare must come to a decision on a claim. Similarly, there is no requirement for any provisional liability to be provided while Comcare or an employer determines ongoing liability.

> Ms James: The Safety Rehabilitation and Compensation Act does not have any enforceable time frames for a decision maker to make a decision. There is reference simply to the decision maker needing to make a decision within a reasonable time. What constitutes reasonable time is obviously up for dispute. We have had a number of clients who have waited an extensive amount of time for a decision. We have one at the moment who has been

23 Slater & Gordon Lawyers, *Submission 8*, p. 3.

> waiting six months and continues to wait and that person has had their leg amputated, so what happens to the medical benefits? The public system pays whilst the decision maker is trying to make a decision.
>
> Senator LINES: To be clear here: I have had some experience and it was a long time ago, so I am certainly rusty on all of the details of the workers compensation system in WA. Under that system, the employer has a 14-day time frame to accept or reject the claim. Are you saying that this person who has had their leg amputated and other people can wait six months not knowing if the claim is accepted or not?
>
> Ms James: Correct.
>
> Senator LINES: So that is six months without income potentially?
>
> Ms James: Correct; that is absolutely right.[24]

1.38 Labor Senators cannot support amendments which increase the cost for workers in the guise of decreasing costs for employers.

Comcare is a poorly performing agency

1.39 Comcare confirmed in evidence a current funding ratio of 64 per cent, which is comparatively poorly performing, with all centrally funded jurisdictions except South Australia and Comcare having funding ratios above 100 per cent, and Queensland, Victoria and Tasmania operating schemes well in excess of 100 per cent.[25]

1.40 The Australian Chamber of Commerce and Industry (ACCI), who were otherwise generally supportive of the amendments, outlined the volatility of such a low performing scheme during the hearings:

> Senator LINES: … is it fair to say or assume that schemes aspire to be 100 per cent funded?
>
> Mr Pattison: I If we are talking about the centrally managed schemes here—New South Wales, Queensland—I think it would be fair to say they would aspire to operate within a band plus or minus around 100 per cent to allow for the natural volatility that occurs so that you are not going back every year with adjustments to premiums and the like.
>
> Senator LINES: So were you aware of the funding ratio of the Comcare scheme?
>
> Mr Pattison: When I looked it is fairly low.[26]

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24 *Proof Committee Hansard*, 20 June 2014, p. 15–16.

25 *Comparative Performance Monitoring 2013*, 15th edition, Safe Work Australia, 2013, p. 2.

26 Mr Gregory Pattison, Special Advisor Workplace Health, Safety and Compensation Policy, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 20 June 2014, p. 10.

1.41 The Department of Employment conceded that the funding ratio was a cause for concern.

> Senator LINES: When I look at your annual report, it seems that Comcare's funding ratio would be an issue.
>
> Mr O'Connor: The appropriate funding of Comcare's public sector workers compensation liabilities remains a priority. The funding ratio for those underwritten claim liabilities is not strong but is strengthening.[27]
>
> …
>
> ACTING CHAIR: Okay. I think you have agreed—I do not want to put words in your mouth, but what funding ratio should a worker's compensation scheme aspire to?
>
> Mr O'Connor: Ideally, whether it is workers compensation or not, any accident compensation scheme would probably be looking at a normal or target funding ratio that is between 90 and about 110 per cent.[28]

1.42 Labor Senators were not persuaded that a scheme so underperforming in terms of funding ratio comparative to state jurisdictions should be expanded into the private sector to be underwritten by employers.

1.43 Slater & Gordon presented evidence in their submission noting that Comcare is also one of the few jurisdictions to record a drop in its durable return to work rate over the last five years, whilst Australia wide, return to work rates in other jurisdictions have remained relatively steady.[29]

1.44 In addition, Slater & Gordon presented evidence that injured workers under the Comcare scheme wait significantly longer for resolution of disputes than injured workers in any other scheme. For example, in 2011/12, 51.6 per cent of injured workers with claims disputed under Comcare failed to have any resolution within nine months. This compares with 4.9 per cent in NSW, 12.3 in Victoria and 4.7 in Qld.[30]

1.45 Some submitters argued Comcare lacked the capacity to monitor performance, regulate and hold to account self-insurers on a national basis, for example, where a self-insurer fails to meet return to work obligations.[31] In response, Comcare explained that on its assessment of applications for self-insurance licences, the Commission

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27 Mr Paul O'Connor, Chief Executive Officer, Comcare, *Proof Committee Hansard*, 20 June 2014, p. 37.

28 *Ibid*, p. 38.

29 Slater & Gordon Lawyers, *Submission 8*, footnote 2.

30 Slater & Gordon Lawyers, *Submission 8*, p. 7, from s. 275 and s. 280 of the *Workplace Injury and Management and Workers Compensation Act 1998.*

31 Australian Lawyers Alliance, *Submission 15*, p. 7.

applies stringent standards and regularly monitors licensees' performance, with regard to such issues as:

> the resources of the corporation applying for the licence…; (b) financial and prudential information…; (c) the claims management systems information of the corporation…; and (d) the past performance of the applicant corporation in complying with and conforming to applicable laws or statutory guidelines in relation to the health and safety of employees, rehabilitation of employees, premium payment and claims management obligations.[32]

1.46 Labor Senators question the response from Comcare, especially with consideration that the Parliament has yet to be provided with any plan for how the Comcare scheme will be extended or have the capacity to employ more staff to provide an adequate level of monitoring. In answers to Questions on Notice submitted expressing concern at the lack of appropriately skilled inspectors, Comcare stated that while aged care, the health industry and mining sectors are not currently in the Comcare jurisdiction, '[s]kills in this area will be acquired when/if companies in these fields enter the Comcare scheme.'[33]

1.47 Labor Senators agree with the majority committee view expressed at the commencement of point 2.25 that 'the committee recognises that Comcare will need to adjust and increase its workforce accordingly'. This would need to be adequately outlined by the Government before expanding the scheme.

Labor Senators' summary view

1.48 Amendments to the Acts in the bill fail to consider the economic impacts of injury, disability and death by implementing a plan allowing self-insurance without adequate assessment of the details, by an agency without adequate resources and oversight.

1.49 Workers' compensation schemes should be designed to provide a safety net for workers injured in workplace accidents, not as a business model to reduce costs for employers that chips away at no-fault benefits and common law trade-offs.

1.50 Labor Senators wish to particularly stress that the implementation of the amendments contained in this bill stand in complete contradiction of the implementation of the National Disability Insurance Scheme (NDIS) and a National Injury Insurance Scheme (NIIS) and would see a shift of burden from the employer back to the taxpayer, nullifying the cost-saving aims of the Government.

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32 Department of Employment, *Submission 6*, p. 7.

33 Comcare, Answer to Questions on Notice, 20 June 2014 (received 17 June 2014).

1.51 Further to the voting down of the bill, Labor Senators suggest that the government assess key recommendations of the Hanks Review to improve the Comcare Scheme as follows:

- introduction of timeframes for decision making and introduction of a review mechanism aligned with these timeframes;
- introduction of provision liability to allow for medical intervention and return to work whilst a claim is being assessed;
- increase of the age restriction on weekly payments to reflect the eligibility for the age pension as it adjusts over time;
- amendments of the circumstances in which an employer can apply for a self-insurance licence, which should only be available to employers who have an exemplary record in health and safety and a demonstrated commitment to workers' rights;
- self-insurance licenses to be automatically revoked in cases where there is a workplace death or serious injury, regardless of fault;
- the administration of workers' compensation by self-insurers to be conducted by arrangements that separate the insurer from the employer, in the same manner as the relationship between a private insurer and the employer as a client;
- workers to have access to an independent body which can review an employer's self-insurance status;
- the Federal Government should establish an inquiry as a matter of urgency to examine the extent of cost shifting by workers' compensation schemes onto injured workers and government services, including the public health system and social security; and
- the Government must immediately guarantee that no worker will be worse off under the scheme, or reject proposed amendments to the scheme in their entirety.

Recommendation 1

1.52 Labor Senators recommend that the Senate reject the bill.

Senator Sue Lines
Deputy Chair

AUSTRALIAN GREENS' DISSENTING REPORT

1.1 For the Australian Greens, workplace safety is paramount. The policy adopted by our membership is crystal clear: "Workplace safety should have an overriding importance over all other aspects of work and Workers' Compensation schemes should prioritise cost-free rehabilitation and full compensation for injured workers."[1] This policy guides the Australian Greens in our consideration of this bill.

1.2 Having considered the evidence and submissions presented to the committee, the Australian Greens find it in clear contradiction to our policy and we cannot support this bill.

1.3 The Australian Greens agree with the assessment of the evidence and submissions made in the Labor Senators' dissenting report.

1.4 Further, the Australian Greens are disturbed by the Abbott government's 'race to the bottom' on workers' compensation. Consistent with the Abbott government's broader ideological approach to workplace relations, the Australian Greens see this bill as lowering the level of protection and support offered to injured workers across the country.

1.5 The Australian Greens will steadfastly defend people's rights at work, including the rights of people injured at work and their families, and thus we cannot support this bill.

Recommendation 1

1.6 The Australian Greens Senators recommend that the Senate reject the Bill.

Senator Penny Wright
Australian Greens Senator for South Australia

1 http://greens.org.au/policies/employment-workplace-relations (accessed 7 July 2014).

APPENDIX 1

Submissions received

1	Queensland Council of Unions (QCU)
2	CFMEU Mining and Energy
3	Finance Sector Union of Australia
4	Australian Manufacturing Workers' Union (AMWU)
5	Community Public Sector Union (CPSU)
6	Department of Employment
7	Shop, Distributive and Allied Employees' Association (SDA)
8	Slater & Gordon Lawyers
9	National Electrical Communications Association
10	Australian Chamber of Commerce and Industry (ACCI)
11	Comcare
12	Australian Federal Police Association
13	Australian Council of Trade Unions (ACTU)
14	Law Council of Australia
15	Australian Lawyers Alliance (ALA)
16	Unions NSW
17	Queensland Government
18	Northern Territory Government

Additional information

1	Document tabled by Senator Lines on 20 June 2014.
2	Additional information from the Law Council of Australia, received 23 June 2014.

Correspondence

1 Clarification of evidence from CFMEU Mining & Energy Division, received 30 June 2014.

Response to questions on notice

1 Response to questions on notice from Comcare, received 26 June 2014.

2 Response to questions on notice from ACCI, received 27 June 2014.

3 Response to questions on notice from ACCI, received 30 June 2014.

4 Response to questions on notice from the Department of Employment, received 30 June 2014.

5 Response to questions on notice from Slater and Gordon, received 30 June 2014.

6 Response to questions on notice from Comcare, received 1 July 2014.

APPENDIX 2

Public Hearing

Canberra, Friday, 20 June 2014.

PARMETER, Mr Nicholas, Director, Civil Justice, Law Council of Australia

REDPATH, Mr Bill, Member, Personal Injuries and Compensation Committee, Law Council of Australia

PATTISON, Mr Gregory, Special Advisor Workplace Health, Safety and Compensation Policy, Australian Chamber of Commerce and Industry

CARRICK, Mr Martin, Practice Group Leader, Slater & Gordon Ltd

JAMES, Ms Rachael, NSW General Manager, Slater & Gordon Ltd

CLARKE, Mr Trevor, Senior Industrial Officer, Australian Council of Trade Unions

DEVINE, Ms Cassandra, Policy and Research Officer, Australian Council of Trade Unions

HUNT-SHARMAN, Mr Jon, President, Australian Federal Police Association

MCANDREW, Mr Wayne Frederick, General Vice President, CFMEU Mining and Energy Division

MCMAHON-HOGAN, Mr Rogan, Teamleader—Employment and Legal, Australian Federal Police Association

CARR, Mr Henry, Branch Manager, Safety and Compensation Policy Branch, Department of Employment

O'CONNOR, Mr Paul, Chief Executive Officer, Comcare

PARKER, Ms Sandra, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment

ROSS, Ms Justine, Senior Executive Lawyer, Department of Employment