Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Proposed changes to the Comcare scheme

Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth)

Submission to Senate Standing Committee on Education and Employment Inquiry into the *Safety, Rehabilitation and Compensation Legislation Amendment Bill* 2014 (Cth)

5 June 2014

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WHO WE ARE

The Australian Lawyers Alliance ("ALA") is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Committee.

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are violated or supported by different Scheme models.

We are well aware of existing methods of compensation reimbursement across the country, in order for individuals to gain access to care, as they deal with intersecting Schemes.

Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field. We are happy to provide further comment on a range of topics for the Committee.

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INTRODUCTION

1. The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Standing Committee on Education and Employment in its inquiry into the *Safety, Rehabilitation and Compensation Legislation Amendment Bill* 2014 (Cth) ('the Bill').

2. The ALA and its members are actively involved in representation of injured workers' in jurisdictions across Australia. We are able to provide the Senate Education and Employment Legislation Committee with insights into the operation and effectiveness of each scheme including Comcare.

3. We are also able to assist the Committee in relation to the legal implications for injured workers of the *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014. T*he entitlements of injured workers are significantly impacted and we detail our concerns below. We also make observations about the impact of the Bill upon occupational health and safety and the application of 'return to work obligations' of employers.

BACKGROUND

4. On 19 March 2014, the Federal Government introduced the *Safety, Rehabilitation and Compensation Legislation Amendment Bill* 2014 (Cth) ("the Bill") into Parliament as part of a package of Bills designed to 'cut red tape' for business.

5. The Bill introduces certain exclusions that would have the effect of preventing injured workers obtaining assistance and compensation under Comcare.

6. This Bill opens the way for a major expansion of Comcare coverage by changing the criterion for private sector employer eligibility to apply for a self-insurance license.

7. The Bill proposes to extend the coverage of the *Work Health and Safety Act* 2011 (Cth) (Comcare Health and Safety regulations) to all corporations that obtain a license under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("SRCA"). This would abolish the jurisdiction of state health and safety regulators in relation to new licensees, reversing a 2011 legislative change.

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8. The precise impact on the rights and entitlements of injured workers will differ by jurisdiction. All workers under Comcare would lose rights as a consequence of the additional exclusions. Workers currently covered by States schemes would, if their employer chooses to self-insure under Comcare, lose access to the protection and compensation provided by the common law.

9. The Bill directly and indirectly reduces the rights and entitlements of workers who rely upon or will in the future rely upon the Comcare scheme.

OUR RECOMMENDATIONS

- Central to this submission is the value that we place on the right of all Australians to have a safe working environment and fair access to medical assistance, rehabilitation and compensation if a worker becomes ill or is injured as a consequence of work.

- Introduction of the 'national employer' test, the new 'group employer' provisions and simpler application processes for employers, will most likely lead to an expansion of Comcare at the expense of state and territory schemes, with a number of significant consequences for the Australian workforce.

- The Comcare scheme would not be the scheme of choice for most injured workers, if they had a choice. The Comcare inspectorate is not administratively resourced to regulate workplace health on a national basis and for most workers it has an inferior workers' compensation framework compared to other schemes.

- The Comcare dispute resolution system and the Administrative Appeals Tribunal are not equipped to deal with an influx of new self-insured employers.

- The Bill does not advance the positive amendments proposed by the Hanks Review, which would make the scheme fairer and more effective.

- Before expansion of the Comcare scheme is considered further, it is critical to ensure that the scheme is advancing towards exemplar status.

- The Regulation Impact Statement (RIS) released with the Bill cites some savings for major corporations as the main reason for this Bill. We do not consider this a just or appropriate objective in the area of workers compensation and work health and safety.

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NEW TESTS FOR EMPLOYER ELIGIBILITY TO SELF-INSURE UNDER COMCARE

10. The 'competition test' currently confines eligibility to join the Comcare scheme to Commonwealth authorities, privatized Commonwealth authorities and corporations in competition with either. The Bill proposes to abolish this test and replace it with a new 'national employer' test.

11. The Bill seeks to amend section 100 of the SRCA by introducing a definition of a "national employer" for the purposes of licensing. A "national employer" means a corporation required to meet obligations under workers' compensation law in two or more Australian jurisdictions or is a self-insurer or self-insured employer in two or more Australian jurisdictions.

12. The effect of repealing section 4(1) and amending section 100 of the SRCA, together with simpler application processes, creates a lesser test and a wider gate for corporations to be granted self-insurance rights under Comcare. Whereas previously only corporations in competition with a Commonwealth Authority (for example, Australia Post and Telstra) were eligible, now all Corporations operating in two or more states or territories are entitled to apply for a license. Additionally, companies that only operate in one state can join a 'group' to self-insure under Comcare if they do not meet the 'national employer' test. The proposed section 104(2A) also means licenses could be given to corporations who held a license immediately before the commencement of this section (whether or not they meet the new test).

13. The proposed amendments also permit groups of related companies to make an application for a single license covering all companies in the group. A 'group' will be constituted where each corporation is related to each other corporation within the meaning of ss. 50 and 46 of the *Corporations Law*.

14. Access for injured workers to the common law, both the exposure the common law gives to health and safety failures and fair compensation for injury, is effectively lost to injured workers if an employer chooses to shift from a state workers' compensation scheme to self-insurance under the new Comcare arrangements. In all other State and Territory jurisdictions, except NT and SA, injured workers retain common law rights.

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15. The proposed licensing arrangements mean large or small companies with no experience of self-insurance could form a 'group' for the purposes of self-insuring under Comcare. The Federal Government again cites savings for companies as the rationale.

16. Given Comcare's small capacity to monitor and regulate self-insurers and the limited powers and resources of the Administrative Appeals Tribunal (AAT), the Bill taken as a whole, effectively de-regulates health and safety, return to work and workers' compensation obligations of, at this stage, an inestimable number of employers.

PROPOSED 'GROUP EMPLOYER LICENSES'

17. Proposed changes to section 98A of the SRCA would allow "single employer licenses" and "group employer licenses" to be granted.

18. Proposed changes to the legislation would allow a 'group employer' license to be granted if:

    a. At least one corporation in the group is a National Employer; or

    b. At least one corporation in the group has employer obligations in a particular Australian jurisdiction and at least one other corporation in the group has employer obligations in another Australian jurisdiction.

19. Where a group license is approved, one corporation in a Corporate Group must be nominated as the "Relevant Authority" for the license and would be the decision maker for the group. The *Relevant Authority* would therefore be issuing decisions with respect to liability in relation to a company of which it may have little knowledge. A potential result is the *Relevant Authority* will make decisions with respect to liability for injury, treatment, incapacity and other payments in the absence of knowledge.

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CHANGES IN ACCESS TO COMPENSATION – WATERING DOWN THE CONCEPT OF NO-FAULT

A. NEW EXCLUSION - INJURY CAUSED BY 'MISCONDUCT'

20. The Bill proposes to amend section 14(3) of the SRCA by excluding compensation for all injuries alleged to be caused by the "serious and willful misconduct of the employee".

21. Currently, compensation for injuries caused by serious and willful misconduct of the employee can be paid, assuming injury was not intentionally self-inflicted, if the injury resulted in death, or serious and permanent impairment. The drafters of the SRCA saw fit to exclude workers severely injured or deceased owing to the difficulties facing such a class of worker in proving their case. All other workers' compensation jurisdictions have similar provisions.[2]

22. 'Wilful' denotes the behaviour to be intentional or deliberate; however, as the deceased has no opportunity to defend his or her actions, the insurer's decision to deny liability will be hard to overcome. A similar argument can be made for those with catastrophic injuries, particularly if they have lost the capacity to articulate the circumstances surrounding the accident.

23. It is not unrealistic or rare that significantly injured workers who survive a traumatic accident are unable to give clear evidence about the circumstances of an accident because of lack of capacity or memory loss.

24. The SRCA provides that the accuser bears the onus of proof. It will be relatively easy, however, for an employer to discharge the onus in the face of a significantly incapacitated or deceased worker. We have serious doubts this process will enable a decision-maker or subsequent Tribunal to make 'the most correct or preferable decision' as required by the *Administrative Appeals Tribunal Act* 1975 (Cth), in the face of an employer allegation that a deceased or significantly injured worker is incapable of rebutting.

25. There are evidentiary issues for injured workers who suffer a significant injury such as a brain injury or injuries which cause a lack of consciousness, as well as those injured workers who suffer memory loss either as a result of the injury itself or due to the effect of treatment and pain medication.

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26. In addition, the Fair Work Commission and its predecessors have on countless occasions recognised safety breaches as valid reasons for dismissal and misconduct. Such breaches may also contravene statutory obligations that are enforceable as an offence, which increases the likelihood that such breaches would be described as serious misconduct at least by employers. In those circumstances, there is some risk these amendments would leave a worker both without a job and without any compensation for a mistake they have already paid an enormous price for in the form of a serious injury.

27. The RIS at 2.6 states, "*In the circumstances where a claimants' injury is the result of their own serious and willful misconduct, community expectations are that the injury would not be compensable".* It is our experience that this statement misreads the way in which many in the community view the misfortune of fatal and catastrophic injuries and their impacts upon individual workers and their families.

28. Arguably this amendment is also in policy contradiction with a separate Commonwealth policy process underway to implement a National Disability Insurance Scheme (NDIS) and a National Injury Insurance Scheme (NIIS). If seriously and permanent injured workers were to be excluded from Comcare benefits on a no-fault basis, they may apply for the taxpayer funded NDIS for disability care and support services, thereby shifting the burden and cost of the workplace injury from the insurer/employer to the taxpayer funded scheme, public health services and families.

B. RE-INTRODUCTION OF EXCLUSION - 'RECESS IN EMPLOYMENT'

29. When the SRCA was enacted in 1988, it provided compensation for workers who were temporarily absent from their place of employment during an ordinary recess (for example, while on a lunch break). In 2007, recess claims were removed from the scheme, and in 2011, re-instated.

30. The Bill proposes to yet again remove this entitlement. Access to compensation for injuries sustained at the workplace during a recess is not affected, and a worker will still be entitled to compensation if he or she was injured during an off-site recess if it is at the direction of the employer.

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31. Injuries during recess breaks are covered in most major schemes[3] as they are seen as part and parcel of a worker's employment. That is, 'but for' a workers' attendance at work, they would not have been injured. Indeed, the drafters of the SRCA considered it an appropriate protection for workers and we submit therefore, it should be maintained.

32. We consider removing this entitlement will be particularly detrimental to a vast number of employees who do not have a fixed place of work. Some examples are police and emergency services workers, road construction workers and tradespeople. Those workers who do not work at a fixed work site are generally not provided with a clear and safe designated place in which to take their break. Consequently, they are in danger of being denied the same safeguards and benefits as those workers with a defined work place if liability for injuries sustained during a break is now placed into question.

C. EXTENSION OF EXCLUSIONS - SUBMISSION TO AN ABNORMAL RISK OF INJURY

33. The Bill proposes to amend section 6(3) of the SRCA, extending the operation of the exclusion to include injuries sustained whilst a worker is undertaking their usual employment duties.

34. The SRCA provides no definition of what is considered an abnormal risk of injury and neither does it define what constitutes "voluntarily" or "unreasonably". The absence of definitions will arguably permit insurers to make decisions about what is an "abnormal risk of injury" and about whether the injured worker "voluntarily and unreasonably" submitted to such an injury.

35. There is no protection for workers who are asked or *persuaded* to undertake dangerous tasks by a representative of their employer. In these cases, although the worker may understand they are submitting themselves to an abnormal risk, they must weigh this risk against disobeying an order. As neither the SRCA nor the Bill imputes a reasonable person test, the injured worker is ultimately at the mercy of the insurer to determine whether liability for the injury should or should not be accepted.

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COMMON LAW ENTITLEMENTS

36. The cap on general damages under the Comcare scheme has not been revised in 24 years. This has eroded the capacity of the system in any realistic sense to correlate damages available with the magnitude of loss suffered by a particular worker.

37. Most other workers' compensation jurisdictions provide caps at considerably higher levels. For example, Queensland and Victoria both have better than fully funded schemes, and continue to afford workers much higher caps on general damages.

38. Many industries now covered by Comcare such as building and construction and the rail and trucking industries have higher health and safety risks. The processes of the common law serve the occupational, health and safety objectives of the scheme because they examine the causes of injury and expose negligent and harmful practices. The common law holds to account employers whose negligent actions or failures have caused or contributed to a worker's injury.

CONCLUSION

39. We are available to assist the Committee further in relation to technical issues and illustrative examples.

REFERENCES

[1] Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

[2] For example, section 14(2) of the *Workers' Compensation Act* 1987 (NSW); section 130 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld); and section 22 of the *Workers' Compensation and Injury Management Act* 1981 (WA).

[3] Section 83 of the *Accident Compensation Act* 1985 (Vic) and section 11 of the *Workers Compensation Act* 1987 (NSW).

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