CONSULTATION

The *Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015* (the Bill) was presented to stakeholders in a series of information sessions. Copies of the proposed bill were not provided prior to the sessions. Participants to the information sessions were required to sign confidentiality agreements and were not allowed to take copies of the Bill, the briefing papers and any notes away with them. There was no consultation. The information sessions were essentially briefings.

It is extremely disappointing that the Government should seek to substantially amend beneficial legislation such as the Safety Rehabilitation and Compensation Act without extensive stakeholder consultation. Some of the changes which the Government is seeking to introduce will result in a significant reduction of entitlements for individual workers and for groups of workers as a whole. The Safety Rehabilitation and Compensation Act 1988 (SRCA) is beneficial legislation. It is incumbent on the Government to ensure that vulnerable workers are protected.

There was significant consultation when the SRCA was reviewed by Mr Peter Hanks SC http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Flcatalog%2F00842377%22 (The Hanks Review). Some of these recommendations have been taken up in the current Bill but many have been rejected.

INTRODUCTION

According to the Minister for Workplace Relations, Eric Abetz the purpose of the Bill is to make the Comcare scheme more sustainable. This is code for making the scheme less costly. The easiest way to achieve this is with an overall reduction of benefits available to workers. Even a superficial analysis of the Bill will confirm that whilst there are some improvements in the Act from a workers' point of view, the vast majority of the changes will mean that workers' rights will be reduced or eroded.

It is disappointing that this approach has been taken. There are other ways to reduce the cost of the scheme and that is to reduce injuries and to get injured workers back to work more quickly.

Whilst the changes introduced in the Bill will be analysed more closely below, measures to put real pressure on employers to have safe work places and to take back injured workers (and to punish those who do not) have not been proposed as part of the package of changes whilst at the same time a sanctions regime has been introduced to punish workers.

There is no doubt workplace injuries do cost too much both in monetary terms and in terms of human suffering. Work injuries cost employers and they cost workers. The SRCA has never provided common law type damages the aim of which is to put a worker in the position they would have been had they not been injured. Increasingly, with limits on and reduction of benefits, workers who are in receipt of compensation under the Comcare scheme, find that they struggle to make ends meet. Many workers with long term injuries go so far backwards after a work injury that they never recover, either psychologically or financially. Of course the effects are worse for those workers whose claims are denied altogether and the proposed changes to the SRCA will mean that some workers will lose the right to receive compensation at all or their benefits under the scheme will be substantially reduced.

If the Government and employers want to save money in the long term the emphasis should be on health and safety and not on trying to reduce benefits once an injury occurs. In the area of mental health in particular, where we are seeing an increasing incidence of psychological injury because of bullying in the workplace, the changes proposed in the Bill will make it even harder for these workers to successfully claim compensation. This means that there will be even less pressure on employers to provide a safe workplace and injured workers will end up on the scrap heap at the cost of tax payers rather than employers.

THE BILL

The proposed changes to the SRCA can be found under a number of broad headings contained under Schedules in the amending Bill:

Schedule 1 amends the Act to alter eligibility requirements for compensation and includes a new definition for ***significant degree*** which now means a "degree that is substantially more than material". At this stage it is hard to know how this definition will play out in practical terms but presumably the definition has been included to further ensure that only injuries with a clear work contribution are accepted under the scheme. In addition, certain matters are to be taken into account in determining whether an ailment or aggravation was contributed to, to a significant degree, by an employee's employment and new eligibility criteria for compensation for designated injuries (such as heart attacks, strokes and spinal disc ruptures) and aggravations of designated injuries will apply.

The threshold for perception-based disease claims will be effectively raised and the scope of the "reasonable administrative action" exclusionary provisions will be widened to encompass injuries suffered as a result of reasonable management action generally (including organisational or corporate restructures and operational directions) as well as an employee's anticipation or expectation of such action being taken. Effectively these proposed changes mean that it will be even harder for workers to claim for a range of injuries (particularly psychological injuries) and many workers (who would presently be eligible to claim compensation under the current legislation) will be locked out of the scheme.

The further attack on claims for psychological injuries is particularly concerning. On the one hand Governments and society generally are expressing concern at the prevalence of work place bullying and of stress in the work place. Many workers never recover from the effects of work place stress/bullying and some actually take their lives. It was in part a response to one young woman who took her life that laws regarding workplace bullying were introduced in Victoria. Brodie's Law was introduced in Victoria in 2011 and made serious bullying a crime which was punishable by up to 10 years imprisonment (The Crimes Amendment Bullying Act (Vic) 2011. Federally concerns about bullying in the workplace gave rise to new powers for the Fair Work Commission which were introduced in 2014 allowing the Commission to investigate allegations of bullying in the work place introducing a mechanism where workers could approach an outside agency to try and deal with alleged bullying whilst it was happening. (https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/workplace-issues-disputes/anti-bullying).

However, the effect of the current "reasonable administrative action" exclusionary provisions and the way these have been interpreted by the Courts mean that it is generally very difficult for workers to overcome the very significant barriers placed in their path in terms of successfully pursuing a claim for workplace stress/bullying. Essentially the precedent created by Hart v Comcare [2005] 145 FCT 29 which essentially found that if the injury is contributed to in any degree by "reasonable administrative action" the whole claim will fail.

While the Hanks Review did recommend a tightening of the provisions regarding "reasonable administrative action," it also recommended changes that would make the operation of the provisions fairer. What makes psychological claims complex is the number

of factors that may have contributed to an injury. Hanks recommended (5.5) that for a claim for psychological injury to fail, the "reasonable administrative action" must have contributed to the injury to a "significant" degree. The current Bill does not adopt this recommendation and indeed goes further in relation to the exclusionary provisions than the current Act by widening the scope of "reasonable administrative action" to encompass management action generally and anticipation of management action. Whilst this was also part of recommendation 5.5 of the Hanks review, it has been cherry picked whilst the rest of the recommendation namely that the administrative action should be the "significant" contributing factor to an injury if the claim is to fail has been ignored.

The fact that spinal injuries are to be covered by these changes is also very disturbing. The Comcare scheme no longer just covers white collar workers. Since the Comcare scheme was expanded to include licensees such as Linfox, Transpacific Industries, K & S Freighters, Thales, TNT and other companies where the work is largely manually based, there are many more workers suffering serious spinal injuries which if the changes are implemented will mean that they are not be eligible to receive compensation. We all suffer degeneration in the spine as we age. The law to date has essentially been that provided that a worker with degenerative changes had been asymptomatic, where an injury at work renders the conditions symptomatic, workers are entitled to compensation. The proposed changes will mean that many workers with back injuries will no longer be eligible to receive compensation and employers will be under less pressure to ensure safe work places in terms of lifting and other manual handling arrangements.

The introduction of "compensation standards" is also of concern. This is a further attempt to codify when injuries should be regarded as compensable and again to reduce the types of injuries covered and the circumstances in which such injuries are covered.

Schedule 2 amends the rehabilitation and return to work requirements in the Act. Positive changes include more emphasis on getting workers back to work and putting pressure on employers to provide suitable duties. Under the proposed changes, workers would be able to request rehabilitation plans and decisions regarding rehabilitation can be appealed to the Administrative Appeals Tribunal (AAT). Nevertheless it is disappointing that employers who fail to provide suitable duties in circumstances where there is evidence that alternative work could be made readily available face no penalties.

Other positive changes include that a worker can remain an employee of his or her original employer but can still look for suitable work elsewhere. Workers have been concerned under the current system of being seen to be abandoning their employment if actively seeking work elsewhere and indeed of putting their benefits at risk if they appear to be fit to do other work although not fit to return to their old jobs.

The proposed changes will however put more pressure on workers to return to work even where they believe that they are not yet ready to do so and/or where they do not believe the rehabilitations plan is suitable and failure to return to work in these circumstances will mean that liability to pay incapacity payments can be suspended or in extreme cases, the right to receive compensation at all will be permanently ceased.

Further the definition of suitable employment has been expanded "to include any employment with any employer, including self-employment". This means that it will be easier for employers to argue that workers have a "deemed capacity to earn" thereby more readily allowing for a reduction in incapacity payments even where the worker is not working. These changes also fail to take into account the fact that even in a buoyant employment market and where a worker clearly has capacity to do some work, it is difficult to find employers who are willing to take on another employer's "damaged goods." In other words, it will become easier for employers to reduce their liability to pay compensation in circumstances where the worker has no real likelihood of ever being able to obtain real paying work.

Finally the expansion of the definition of “suitable employment” to include a requirement for a worker to change his or her place of residence provided it is reasonable to do so is concerning and smacks of “big brother”. A change of residence inevitably requires expense and dislocation for a worker and his or her family. One wonders in what circumstances this requirement could possibly be regarded as reasonable.

Hanks recommended that the SRCA be amended to provide for a requirement that all reasonable steps be undertaken to return an injured employee to work (6.14) and to provide for the power to impose penalties where this does not occur (6.17). Further, Hanks recommended the establishment of a scheme wide job placement program (6.18). This could work particularly well with respect to workers with work related psychological injuries where the barriers to ever returning to the workplace where their injuries occurred are in many cases insurmountable.

It is very disappointing that this approach has not been adopted by the Government. There would be a certain reciprocity involved in a scheme wide job placement program i.e. employers would be a lot more willing to take on a worker injured in another workplace if they knew that other employers would be under pressure to take on “their” injured workers.

Schedule 3 provides for more timely and responsive services and support for injured employees by requiring employers to forward claims to Comcare within 3 days of receipt and specifying time limits in relation to the determination and reconsideration of compensation claims (based on recommendation 9.2 of the Review). These proposed changes are most welcome and bring the Comcare scheme into line with most state based workers compensation schemes.

Another welcome change is that Comcare will be able to pay compensation for detriment caused by defective administration.

The proposed changes to require third parties to indemnify compensation payers are appropriate but the opportunity to remedy what has been an inequitable process for workers who may have a damages claim against third parties but who under state based legislation are not entitled to full recovery regarding loss of wages for example has not been taken up. Under the Transport Accident Act (Vic) 1996, there is no entitlement to claim for loss of wages in a damages claim for the first 18 months following a motor vehicle accident because these benefits are covered under the state based no fault scheme. Workers covered by the SRCA who are injured in motor vehicle accidents are required to repay all benefits received under the Act if they receive damages including the first 18 months of incapacity payments even though under the state based scheme they cannot recover damages for this loss. As federal legislation takes precedence over state based legislation, workers injured in car accidents in Victoria who recover damages are forced to repay all benefits received under the SRCA including the first 18 months of incapacity payments even though under the state legislation, there is no capacity to claim this loss as part of their damages. This is inequitable and the Government should take the opportunity to remedy this in the current Bill.

Schedule 4 amends the Act to allow an employer to make provisional medical expense payments (capped at $5,000) in respect of a claim for injury before liability has been admitted. This is a positive change. Often early medical intervention can assist in quick recovery but many workers are unable to afford treatment on a “private” basis and this funding will allow referrals to specialists and investigations to be undertaken without having to wait for approval through the public system. However Hanks also recommended provisional acceptance of liability so that an injured worker may access up to 12 weeks in incapacity payments (recommendation 6.1). Interim liability to pay incapacity payments mean that workers can survive financially whilst claims are being investigated. The capacity to be paid and to have treatment also means that some of the “heat” would be taken out of claims during the investigation phase and this in turn generally means that

workers are better disposed to trust an employer and be more willing to give early return to work a go.

Schedule 5 amends the Act to impose more rigorous requirements in relation to determining the amount of compensation payable under section 16 of the Act in respect of medical expenses incurred by an injured employee including claims for household and attendant care services. The change in the definition of "medical treatment" to instead refer to "therapeutic" treatment is of concern. "Therapeutic treatment" is defined in s4(1) of the SRCA as "treatment given for the purpose of alleviating, an injury". Not all appropriate treatment will "alleviate" a condition and a denial of treatment which does not on the face of it "alleviate" an injury might result in workers being denied important medical treatment which may "maintain" rather than "alleviate an injury and which may in the long run cost the system more if the failure to provide the treatment means that a worker is unable to return to or stay at work, not to mention the increase in suffering to a worker.

The introduction of "clinical framework principles" is of similar concern to the "compensation standards" referred to above. Again this smacks of trying to codify what might be reasonable medical treatment which surely is a matter of individual application.

The proposed capacity to require a worker to attend a "designated" medical practitioner seems unduly complicated and unnecessary. Provided a medical practitioner is qualified, why should a particular practitioner be "designated" by the worker?

The proposed capacity for Comcare to introduce rates for particular types of medical examinations is also of concern. The best doctors may well decline to do the work for the available Comcare "rate". Section 115A states that the relevant authority may request a report from the treating doctor. Does this mean that a worker's authority is no longer required? Will treaters be prepared to provide reports, given also that they will again only be paid at the Comcare "rate"?

Schedule 6 provides for a tiered approach in household and attendant care services which will limit the periods that compensation for these services can be paid to workers with "non-catastrophic" injuries. The proposed changes also require that attendant care services are provided by accredited, registered or approved providers and not by relatives or household members.

Essentially household services will be limited to 3 years post injury except in the cases of catastrophic injury. The devil may be in the detail here but there would be many very severe injuries which would not be defined as "catastrophic" in the ordinary usage of the word.

Injured workers and their families suffer many losses and face significant pressures because of the inevitable reduction of income, the anxiety and uncertainty of being dependent on the compensation scheme, knowing that they are regarded as a drain by employers and society generally and not being able to do all the things that they used to do before the injury occurred. To further restrict access to home help and other services adds to the burden experienced by these workers who find themselves dependent on compensation through no fault of their own and are then forced to rely on spouses and family members putting further pressure on relationships which have already been put under enormous strain.

Schedule 7 amends the Act to suspend compensation payments when an injured employee is absent from Australia for non-work related purposes for a period of more than 6 weeks. Many Australian workers are from non-English speaking backgrounds who may need to spend considerably more time in their country of origin than the allowable 6 weeks to look after family and other affairs. The exceptions in the proposed amendments would appear to be reasonable.

Schedule 8 amends section 116 of the Act to provide that an employee is not entitled to take or accrue any leave entitlements while on compensation leave. Currently workers accrue annual and sick leave during the first 45 weeks of compensation leave and continue to accrue long service leave beyond that date.

Schedule 9 contains amendments which alter the method of calculating an employee's weekly incapacity payments. These changes by and large appear to be fair.

However the introduction of the new "step down" provisions which reduce the amount of weekly compensation payments an injured employee is entitled to are unfair. This means that workers will no longer be entitled to full pay for the first 45 weeks and long term payments will be reduced to 70% instead of the current 75% of normal weekly earnings which is payable.

In addition, overtime and allowances, which are included in the definition of salary, will no longer be included after the first 104 weeks of incapacity

As stated above, the burden to workers and their families that being injured creates can be very costly. Any move to further reduce compensation benefits further aggravates the difficulties being experienced by them.

The transitional arrangements are also complicated. These changes (if passed) should only apply to workers who are injured after the commencement date.

The proposal to remove the 5% deduction on compensation payments to employees who are accessing superannuation benefits is fair and long overdue.

The increase of the maximum age that incapacity benefits can be received from the current age of 65 to "pension age" is also appropriate.

Schedule 10 amends the Act to increase the compulsory redemption threshold where weekly payments of incapacity benefits are up to $208.91 per week. This figure is still way too low to make redemptions (ie pay-outs) an attractive option for workers.

Whilst there is always a lot of debate about "pay outs" versus ongoing benefits in statutory compensation schemes, it is the case that workers inevitably want "out" of the system and a process which allows this to occur so that workers are not disadvantaged and with significant savings to the system should be implemented and was recommended by Hanks.

Schedule 11 includes a proposal that legal costs may be payable if on reconsideration a worker has a more favourable result. This proposal makes sense. Workers are more likely to retain lawyers to act for them at the reconsideration stage if there fees are likely to be paid/contributed to by the relevant authority on a "successful" result. If lawyers are involved at an early time this will likely assist the relevant authority in coming to the right decision and may avoid legal costs being incurred further down the track if the wrong decision is made. Further, the relevant authorities have access to legal advice if required and as institutional respondents they are in a much stronger position to understand the law and the claims process as compared to an unrepresented worker. This proposal is more likely to "level the playing field." Further the undertaking required by a worker to not apply to the Tribunal if an offer including costs is accepted is a fair trade off.

However the proposal that an unsuccessful claimant may be required to pay the relevant authority's legal costs is of concern and may well mean that many deserving, but potentially difficult, claims will not reach the Tribunal. It also means that employers/Comcare will be able to "bully" workers into accepting settlements that might

not be in their best interests with the threat of an application for costs if the matter proceeds and the worker fails.

Accordingly any proposal which puts a worker at risk of having to pay the considerable legal fees that can be incurred at the Tribunal is opposed. Having said that there may be scope for the possibility of workers paying the other party's costs where applications are vexatious and/or clearly without merit.

The schedule of costs, depending on where it is pitched, may also have the capacity of discouraging workers from running their cases if they are left with a large legal bill for any shortfall not covered by other party. There is of course currently a schedule of costs which in the AAT is 75% of the Federal Court Scale. No reason has been advanced as to why this schedule is unfair or inappropriate.

Schedule 12 – The proposed changes to the calculation of lump sums in permanent impairment claims are reminiscent of the changes introduce in the 2.1 Edition Guide to the Evaluation of Permanent Impairment. Rather than increasing the threshold from 10% to 20% in relation to muskulo skeletal injuries which would have been politically unpalatable, the then Howard Government simply introduced a new Guide which made it twice as hard to get to 10%.

Further codifying the requirement and manner in which previous "impairment" is to be taken into account is also aimed at reducing the circumstances in which workers injured under the Comcare scheme will be eligible to receive lump sum impairment.

The Minister has certainly trumpeted the increases in the maximum payment available in permanent impairment claims. However, he fails to mention that only a handful of claimants are likely to benefit from this increase and that the vast majority of potential claimants will see their lump sum entitlements being substantially reduced. Further the changes introduce a level of complexity in calculating the entitlement which is likely to result in significant litigation.

The changes to the pre-Canute position of multiple impairments being combined when resulting from a single injury is welcome. The combination of the Canute decision and the introduction of the 2.1 Edition guide (referred to above) meant that many workers who would under the old system have received lump sum compensation missed out.

The proposed abolition of impairment for secondary psychiatric injuries is further evidence that workers with work related psychiatric injuries being punished under this proposed legislation.

Section 13 and 14- these proposed changes would seem to be appropriate.

Schedule 15 proposes changes which are meant to "streamline and enhance the existing regime of sanctions. Again the proposed changes seem to punishing of workers rather than creating a system of trust and mutuality. Notably there are no sanctions proposed for employers who lie who fail to provide all material relevant to a claim.

The proposed s29H requires that a diagnosis of a psychological injury must be made by a "mental health practitioner." Again this seems to be unduly punishing of workers with mental health injuries and continues the theme throughout the Bill that workers with psychological injuries are treated differently and more harshly than workers with other injuries.

Of most concern is the capacity to suspend incapacity payments where a worker does not follow medical advice. The decision to accept medical advice is complex and personal. Choice of medical practitioners and proposed treatment should not be interfered with by an

employer or insurer. Workers should not be blackmailed into accepting treatment that they disagree with, or are fearful of, under the threat that they will lose their income if they do not comply. Having said that, it is important that even under the proposed changes, a refusal to have surgery and/or take a particular medication cannot be relied upon by a relevant authority under this section.

Finally the proposed sanctions regime is harsh and punishing and is unlikely to foster trust and mutual respect in the compensation relationship. The fact that the sanction regime means that workers can permanently lose their rights to any compensation at all (save for in death claims and claims for funeral expenses) would seem to be unnecessarily harsh.

CONCLUSION

There are some very positive changes proposed in this Bill but from a worker's perspective the Bill introduces a regime very different to a scheme which has to date tried to provide lifetime support (where necessary) to injured workers.

In particular, the proposed legislation is very hard on workers who develop psychiatric injuries. Clearly this is a response to the rise in the number of claims for psychological injuries observed by Hanks and the relative cost of these claims as compared to "physical" injury claims. (http://www.abc.net.au/local/stories/2013/04/03/3729198.htm)

However placing more hoops in the paths of psychologically injured workers to stop them successfully claiming or remaining on compensation benefits won't solve the problem for the Government. The proposed changes might reduce the scheme costs in the short term but someone (the taxpayer) will still have to pay for people who suffer long term psychological injuries.

Instead of reducing benefits available to workers, the Government should be asking what is making workers sick and how to decrease the incidence of work place bullying and stress. There is no incentive for employers to deal with bullies in the workplace, or indeed with injuries generally, if they do not have to deal with the consequences and someone else has to pay for the damage done.

This is particularly so under the Comcare scheme where there is effectively no common law right to sue. In other words, the decision to set the maximum payment for pain and suffering damages with respect to a negligence action at $110,000 (which has not been indexed since the SRCA was introduced in 1988) means that no matter how bad the employer's negligent conduct, it is not in a workers' interests to sue given the limited nature of the damages available under the Act. However common law or negligence actions have been a powerful tool for change and improvement of safety in workplaces. This Bill does very little to put pressure on employers to improve safety in the workplace.

It is also the case that injured workers already feel that they are being punished for having suffered an injury in the first place. The sanction regime proposed in the Bill will only heighten distrust and fear in workers and will likely lead to psychological injuries even where the primary injury is a physical one.

In addition whilst there are clearly proposals which are favorable to workers, the bulk of the changes constitute an overall reduction in the benefits available to workers with the changes aimed at reducing incapacity benefits, payment of medical expenses, home help services, lump sum impairment, exposing unsuccessful claimants to the possibility of having to pay legal costs and finally and most importantly the sanctions regime which can compel workers to have treatment they do not wish to have or may be fearful of and which may mean that workers lose their rights to compensation altogether.

This Bill should not be passed without substantial amendment.