AMWU

30 May, 2014

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: *eec.sen@aph.gov.au*

Dear Committee Secretary,

Re: Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014

The AMWU is pleased to submit a response to the Safety, Rehabilitation and Compensation Act Amendment Bill 2014.

The AMWU represents workers employed by government agencies and statutory authorities and self insurance licensees. The AMWU refers the Review to the submissions made on behalf of the Australian Council of Trade Unions.

The contact person for our submission is:

Dr Deborah Vallance
National OHS Coordinator
Australian Manufacturing Workers' Union

Yours sincerely,

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NATIONAL PRESIDENT

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AMWU Submission to Senate Education & Employment Committee

Safety, Rehabilitation and Compensation Amendment Bill 2014

30th May 2014

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The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU has a membership of more than 100,000 members who work in every State and Territory of Australia. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations. The AMWU has membership in Comcare, both in the public sector and with private self insuring corporations.

The AMWU has members under Comcare or employed by self insuring companies granted approval to apply to Comcare. These self insuring companies where AMWU has membership include Thales, John Holland Pty Ltd, Asciano, Chubb, TNT Australia, Transpacific, BSI Industries, Snowy Hydro Ltd, Telstra, Toll Holdings, Linfox Australia Pty Ltd and K&S Freighters Pty Ltd.

Background

The AMWU supports the comments submitted by the Australian Council of Trade Unions.

The AMWU supports the ACTU Charter of Workplace Rights in regard Occupational Health, Safety, Compensation and Rehabilitation, as a best practice standard for all jurisdictions including Comcare and self insurers within Comcare. The Charter is provided as an Annex to the ACTU submission.

The AMWU notes that

- Workers compensation scheme should seek to return injured workers back to the maximum medical recovery achievable and the highest quality of life. Workers compensation legislation is beneficial legislation targeted at injured and ill workers.
- A fundamental objective of any workers compensation systems needs to be an equitable, fair and just system of income protection, access to medical treatment for workers with work related injuries or illnesses, and a mechanism to aid injured workers back to work.

The AMWU most recently expressed our objections to any increase in the number of self insurers in the Comcare scheme and made proposals that would improve the SRC Act to the Hanks Hawke Review in 2012. The breadth of our recommendations was broad but did highlight inferior claims management in the Comcare system, a problem which was acknowledged by the Hanks Hawke Review. The AMWU reiterates our support for an improved disputes process, mandating time frames for decisions around liability and benefit payment and the introduction of a provisional liability system.

THE SAFETY, REHABILITATION AND COMPENSATION LEGISLATION AMENDMENT BILL 2014

The SRC legislation Amendment Bill proposes to expand Comcare self insurance to a broad range of employers, large and small. If adopted it will significant change Australia's workers compensation arrangements.

The AMWU foresees detrimental short and long effects on workers entitlements to benefits, rehabilitation and the handling of disputed claims for workers employed by self insurers and premium payers.

There is no indication that in the current circumstances Comcare will be able to diversify its regulatory and compliance activity. An expansion of the numbers of self insurers would mean that ComCare as a regulator would need to increase the range of activities and numbers in the inspectorate to adapt to the changed nature of the scheme. The AMWU has little confidence in such a change given the past and current policy positions of Comcare and the forecast of job loss in the Federal public service [which includes Comcare].

The AMWU is extremely concerned about amendments to workers compensation which are about shifting the burden onto workers alongside an eroding of the "no fault" concept underlying workers compensation legislation.

For these reasons the AMWU recommends rejection of Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014.

Self Insurance

The AMWU has in principle objections to an expansion of self insurance and a number of specific concerns in the context of this Bill.

The expansion of self insurance under the Comcare scheme is opposed. The union movement consistently raises this concern with all workers compensation systems –

> *The ACTU has an in-principle opposition to self-insurance. We cannot support the concept that a group of employers can be allowed to opt out of contributing to the premium pool of workers compensation systems at either an individual state or national level. If self-insurance is to be a feature of a scheme it should only be available in very limited circumstances and must involve a high level of ongoing oversight and monitoring by scheme regulators. Self-insurance in this scenario should be viewed as a privilege not a right. Employers wishing to become or remain self-insurers must earn that privilege by bringing to workers compensation systems a superior performance in all areas of injury prevention, claims management and occupational health and safety standards. Self-insurers should be role models for other employers in terms of workplace safety, claims management and occupational rehabilitation by virtue of their special status. Further self-insurers should be required to share with scheme contributing employers those systems and programs that allow them to achieve a superior performance. It is the Policy position of the ACTU that workers must not be adversely affected by any employer moving between jurisdictions in relation to their OHS and workers' compensation entitlements. Any proposed move between jurisdictions will only occur following genuine consultation and agreement with workers and their representatives and a process of public review, including public tribunal hearings.*[1]

The union movement has always opposed the design of workers compensation systems which are premised on the view that workers views and the outcomes for them are irrelevant. There is little during the process of granting of licences that considers any preferences or views of workers of the business. There is also no consideration of views or impact on the state scheme that the applicant is leaving. . The ACTU representatives on the SRCC have tried unsuccessfully to remedy this but arrangements have changed little and are essentially the same as when Justice Callinan in his dissenting decision in the Optus[2] case noted "The 'choice' is the choice of the employer alone".

Any expansion of the number of Comcare Self Insurers will have both short and long term impacts on the Comcare scheme:

Self insurers can exert a very strong influence on a scheme. The Comcare scheme currently has the largest numbers of employees covered by self insurance of all the schemes [45%, compared to the next highest of SA 38% & NSW 23%]. Schemes like Comcare get more expensive for insurers over time, so it is very likely that current and future Federal governments will be lobbied heavily to cut costs to employers which are invariably achieved by reducing benefits to workers.

Many self insurers have indicated their opposition to the Comcare entitlement regime and have indicated a strong preference for a less "generous" scheme. [3] The AMWU cannot support changes which on the available evidence will decrease the benefits available to injured and ill workers.

The repeal of section 100 of the SRC Act would create a lesser test and a wider gate for corporations or other smaller businesses to be granted self-insurance rights under Comcare. The insertion of a new s107B would allow for two or more corporation to apply for a group employer license even if the corporations individually operate in only one workers' compensation jurisdiction. This would allow smaller employers operating in only one state or territory to opt out of the state workers' compensation scheme in favour of Comcare.

Compared to current state jurisdictional arrangements for group self insurance the proposals in the Bill are deficient.

For example:

a. Queensland the employer needs to have at least 2000 full time employees, and a cash deposit of $5 million or 150% of estimated claims liability;

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[1] Australian Council of Trade Unions Reply Submission To the Safety, Rehabilitation & Compensation Act 1988, Review Report 3 May 2013
[2] Attorney General {Vic} vs Andrews [2007] HCA 9
[3] National Council of Self Insurers. Productivity Commission response — national workers' compensation and occupational health and safety frameworks, Adelaide, 2003 cited in Purse, K. *Workers compensation, workplace health and safety and the "new" Federalism. J Occup Health Safety –Aust NZ 2007, 23(2): 107-111*

b. NSW the employer needs to employ 500 permanent staff and has to show long term financial viability for the previous five years , is conservatively geared and sound profit history and cash flow;
c. South Australia, the policy is more than 200 with a net worth of $500 million, gearing ratio of 2 and a liquidity ratio of 1.3:1.

The proposed Comcare Group Licence system has fewer financial requirements and is open to far more employers than comparable state group licensees; there is no proposed minimum limit on number of employees, and the financial requirements are to be set out in Ministerial guidelines, rather than a legal instrument. Workers compensation payments covered by a group licensee maybe jeopardised due to limited ability to cover future liabilities.

The likelihood and impact of an exodus of employers from State schemes and the undermining of the viability of State schemes has not been addressed. If the exodus is confined to current state self insurers the impact would be less but the proposed amendment makes no such provision.

Proposed Section 104(2A) also means licenses could be given to corporations who held a licence immediately before the commencement of this section (whether or not they meet the new test).

The ACTU and affiliates have persistently raised our concerns about the lack of genuine consultation with workers and their unions during the granting or extension of licences. The SRCC has some powers and Comcare does some monitoring of self insurers but those powers are inadequate. In fact, if a business becomes a self insurer it is a privilege that has never been revoked. Poor safety performance that has been confirmed through successful prosecutions for serious OHS breaches or fatalities does not lead to a change in self insurer status.

Comcare as a Health and Safety Regulator

There are no proposals, of which the AMWU is aware, to increase the resources available or to change the compliance activity of the inspectorate or the legal capabilities of Comcare.

An increase in the number of self insurers would diversify the profile of Comcare to be more like a State jurisdiction. This requires a different inspectorate to undertake more compliance activity.

Compared with other jurisdictions Comcare has a poor activity record as a regulator. However an expansion in self insurer will make the profile much more akin to that of a state jurisdiction which necessitates a different approach by the inspectorate.

Comcare has functions and powers under the WHS Act including monitoring and enforcing compliance with the WHS Act for an estimated 400,000[1] full time equivalent (FTE) employees.

In the 12 month reporting period from 1 July 2012 to 30 June 2013 Comcare undertook

- 342 investigations and 2050 "interventions" (liaison, campaign and stakeholder engagement activities including investigations)[2] and
- issued 4 Non-disturbance Notices, 16 Prohibition Notices & 18 Improvement Notices.

In the same 12 month period, WorkCover NSW inspectors covering 3, 165, 700[4] employees

- conducted 19,633 visits,
- issued 8186 notices- including 550 Prohibition Notices, 6111 Improvement Notices &124 Penalty Notices.

[1] As at 30 June 2013 as reported in SRCC and Comcare Annual Reports 2012-2013, p38
[2] Ibid p171
[4] In 2010 – 2011 as reported in Comparison of workers' compensation arrangements in Australia and New Zealand, 2012–13, p21

A comparison between the activities of the two regulators reflects rather poorly on Comcare.

	Workplace inspections per 1000 employees	Notices per 1000 employees
ComCare	0.86 [342 per 400,000 employees]	0.095 [38 per 400,000 employees]
NSW	6.2 [19,633 per 3,165,000 employees]	2.6 [8186 per 3,165,700 employees
Ratio NSW/Comcare	7 times more in NSW cf Comcare	27 times more in NSW cf Comcare

Using this data it can be seen that in NSW employees have significantly more likelihood of inspectors visiting workplaces and issuing notices. There is no indication that Comcare are prepared for an activity change which is necessary for a broader more diverse jurisdiction.

Comcare, and did not commence any civil proceedings or criminal prosecutions under the WHS Act or accept any undertakings. One previously commenced OHS civil enforcement proceeding and 9 enforceable undertakings continued. [3] NSW successfully concluded 98 work health and safety prosecutions. As at 30 June 2013, 172 defendants were before the courts for breaches of work healthy and safety legislation, not including the two matters currently under appeal involving six defendants.[5]

The Regulation Impact Statement (RIS) released with the *Bill* cites minor savings for major corporations as the rationale but this will come at a high price, particularly for workers in high risk industries.

The Federal government has indicated that there will be a significant loss of jobs in the federal public service; this will undoubtedly have an impact on an already under resourced Comcare.

Serious and Wilful Misconduct

Section 14 is to be amended so compensation for injuries is not payable when they are alleged to be "caused by the serious and wilful misconduct of the employee".

The Regulation Impact Statement notes that this introduces a 'new concept' in workers compensation (pxvii), yet the document dedicates only a few lines to discussion of the rationale, stating without a source that the new exclusion is aligned to 'evolving community expectations'. The RIS is not able to identify savings associated with this proposal.

Despite the characterisation of the misconduct as "wilful", where death has been caused, how can the deceased's actions be considered "wilful" without them having an opportunity to respond to an employer's allegation? The same issue may arise in instances of catastrophic injury where the injured worker is unable to explain the circumstances of a work place accident.

The legislation provides that the accuser bears the onus of proof. It will be relatively easy for an employer to discharge the onus in the face of a significantly injured or deceased employee. Given the lack of procedural fairness afforded to a severely injured person or the dependants of a deceased, we have serious doubts this process will enable a decision-maker or subsequent Tribunal to make 'the most correct and preferable decision' as required by the *Administrative Appeals Tribunal Act 1975*.

Re-introduction of exclusion - 'Recess in employment'

In 2011, the government reintroduced compensation for workers who were temporarily absent from their place of employment during an ordinary recess (for example, while on a lunch break). The proposed amendments would remove this entitlement. Part of the resonating for the introduction of the 2011 amendment was the considerable legal "grey area" created by the abolition of this entitlement.

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[3] Ibid p 182-183
[5] The WorkCover Authority of NSW 2012–2013 Annual Report, p18

Extension of exclusions - submission to an abnormal risk of injury

A further amendment is proposed so that compensation for injuries is not payable to a worker in cases where he or she 'voluntarily and unreasonably submitted to an abnormal risk of injury' in the course of employment. We have strong concerns about this proposal as it implies that if a worker fails to speak up about risks then they will not be able to apply for compensation. For example if a nurse breaks the fall of a patient. The nurse is being asked to make a choice between protecting the safety of a person under their care and should anything happen, the availability of access to workers compensation—no one should ever be placed in a position of choosing between looking after others and their own right to compensation should something go wrong.

Conclusion

For these reasons the AMWU urges the Senate Education and Employment Committee to reject the Bill.