



Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015

*A Submission by Slater and Gordon Lawyers to the
Senate Standing Committee on Education and
Employment Legislation*

Prepared by Ms. Rachael James, Comcare National Practice
Group Leader and General Manager NSW/ACT

SLATER AND GORDON LAWYERS
C/O Level 5, 44 Market Street, Sydney, NSW 2000

SAFETY, REHABILITATION AND COMPENSATION LEGISLATION AMENDMENT (IMPROVING THE COMCARE SCHEME) BILL 2015

About Slater and Gordon Lawyers

1. Slater and Gordon is a national law firm providing legal assistance and representation to injured workers across all jurisdictions in relation to the eleven workers' compensation schemes operating in Australia. The firm has also handled some of the most complex and ground-breaking common law cases in Australia that have resulted in significant advances in workplace and public health and safety. As well as assisting individuals, Slater and Gordon provides advice to unions and assists them in their work to ensure the Comcare scheme meets its obligations to injured workers. Slater and Gordon acts for injured workers covered by the Comcare scheme in all states and territories.
2. We are able to assist the Senate Education and Employment Legislation Committee in relation to questions it may have about the impact of the *Safety, Rehabilitation and Compensation Legislation Amendment (Improving the Comcare Scheme) Bill 2015* on the rights and entitlements of injured workers.

Background

3. On 25 March 2015, the Federal Government introduced the *Safety, Rehabilitation and Compensation Legislation Amendment (Improving the Comcare Scheme) Bill 2015* (the Bill) into Parliament.
4. The Bill makes a series of significant changes to the Comcare scheme in addition to those already proposed in the *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014* (the 2014 Bill). The Bill will dramatically reduce the rights and entitlements of workers currently in the Comcare scheme. Many more thousands of injured workers will lose rights to compensation if the 2014 Bill is passed as the 2014 Bill proposes opening up the Comcare scheme for major expansion nationally.
5. The Bill fails to give effect to most of the recommendations made in the Hanks/Hawke Review, especially those which would be advantageous to injured workers. It contains a series of devices to remove injured workers from the scheme and other provisions that reduce quantum of compensation. We believe that almost all provisions in the Bill are unfair to injured workers and that some of the provisions can be characterized as grossly unfair and inhumane.

Executive Summary

- + Central to this submission is the policy priority we believe should be given to the health and safety of all workers and to the protection of vulnerable injured workers. Taken as a whole, the Bill undermines this priority and is unbalanced and unfair.
- + 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. It does so by proposing a raft of mechanisms to exclude injured workers from eligibility for the scheme and by cutting the quantum of benefits that can be paid. It also abolishes or limits benefit categories for example attendant care.

- + The Bill also sets out an extraordinarily punitive 'sanctions regime' which is inappropriate for any workers' compensation system. In particular, the Sanctions provisions in Schedule 15 include cutting compensation and future rights to claim for an injury, no matter how serious, for alleged failures to meet an 'Obligation of Mutuality' as determined and reported to Comcare by the employer.
- + The new 'Obligations of Mutuality' which are entirely obligations of injured workers includes a new 3 stage 'sanctions regime' which serves to extinguish the rights of highly vulnerable and injured citizens. Even though the worker may be unquestionably ill and incapacitated for work, they will be denied workers' compensation support if the employer or Comcare alleges breaches of the 'Obligations of Mutuality' or other directions allowed by the Bill, and the injured worker does not have the emotional or financial resources to defend the charges.
- + The Bill introduces fault as a means to exclude injured workers from the scheme. The concept of Comcare as a no-fault scheme would be ended by the Bill through the expansion of a number of eligibility restrictions and sanctions that would operate to prevent injured workers from receiving compensation.
- + The Bill vests Comcare with several new powers including the ability to specify and change what is and is not a 'designated injury', create Compensation Standards, Clinical Framework Principles, Medical Rate and Legal Costs Schedules and an Incentives Scheme for potential employers to name but a few. These concepts should be subject to consultation and debate.
- + Eligibility requirements are changed to allow a susceptibility to an injury or illness to count against a worker. This strikes at the right of all workers to be covered by a workers' compensation scheme, especially older workers.
- + The exclusionary provisions are broadened by the introduction of the term "management action". Injuries can now be excluded if they are the result of "any direction given for an operational purpose or purposes" or "anything done in connection with such an action". This will include physical and psychiatric injuries.
- + Earlier step down in incapacity payments, reduction in allowances and earlier reductions of payments for those earning above average earnings provide a range of ways for Comcare to reduce incapacity payments, affecting all injured workers covered by the scheme.
- + Reducing benefit payments for permanent impairment to approximately 90% of claimants by reducing the amount of compensation payable to those suffering less than 40% whole person impairment, dissolving the pain and suffering component into the flat rate and removing lump sum compensation for secondary psychological conditions.
- + This submission identifies ten significant Comcare benefit categories that will be further altered because the Government has foreshadowed but has not yet developed regulations to further determine and limit the rights and entitlements of injured workers. We submit the whole impact of the Bill upon injured workers cannot be known until the contents of the proposed regulations are available.

Recommendations

6. The primary objectives of Comcare should be to:

- 6.1. Oversee safe and healthy workplaces and work environments for workers covered by the scheme;
- 6.2. Ensure injured workers are supported by timely medical care, rehabilitation and where necessary, vocational assistance to recover and wherever possible, return to work as quickly as possible;
- 6.3. Provide fair and equitable workers' compensation benefits for injured workers;
- 6.4. Provide timely, accessible and just dispute resolution processes.

7. This Bill fails to meet any of the objectives above and should be withdrawn. There is no policy justification for the reduction in benefits to injured workers or for shifting the cost of workplace injuries from the Comcare workers' compensation system to injured workers, their families, welfare agencies, the National Disability Insurance Scheme and to the public health system.

SCHEDULE 1 – Eligibility

8. Each of the principal changes in Schedule 1 would serve to exclude injured workers from eligibility for compensation and are summarised as follows:
- a. Changing an existing exclusionary provision that excludes injuries caused by 'reasonable management action taken in a reasonable manner in respect of the worker's employment' and broadening it to a 'reasonable management action' that includes everyday operational directives and excludes both physical as well as psychiatric injuries;
 - b. Introducing the concept of 'designated injury', which imposes a higher eligibility test upon a worker for a number of illness and injuries in order to satisfy an entitlement to compensation (some named in the Bill and others to be in future regulations);
 - c. Susceptibility or vulnerability to injury or illness is proposed to count against an injured worker in a liability determination;
 - d. Exclusion of psychiatric injuries by the imposition of a 'reasonable belief' test regarding the injured worker's interpretation of 'an incident or state of affairs'; and
 - e. Introduction of 'Compensation Standards', yet to be defined in regulations, that will set Comcare boundaries and limit eligibility for any ailment that may be specified in future.

Exclusion for 'reasonable management action'

Item 9 Subsection 5A (1) (2) and (3)

9. The current scheme significantly restricts access to workers' compensation for those whose injuries result, at least in part, from a reasonable administrative action undertaken in a reasonable manner. The Hanks/Hawke Review agreed with this proposition and recommended against further exclusions or changes to these provisions.
10. The Bill alters and significantly broadens the exclusion by changing the term 'administrative action' to 'management action' which is far broader and may include operational directions. If an employee is injured as a result of a management action, they will have to prove fault (that the management action or directive was unreasonable) in order to qualify for compensation.
11. Rather than be limited to actions concerning the employment relationship as is currently the case, the new provision will exclude injuries, including physical injuries, that result from any operational

direction given at any time prior to the injury unless the direction is not reasonable. A 'direction given for an operational purpose or purposes'¹ potentially excludes any injury in the course of work since all work activity flows from some direction for an operational purpose.

12. Hence, an injury which has been contributed to by a system of work may be excluded from compensation unless the worker can establish that the system of work was not reasonable. This introduces the concept of fault into a no-fault scheme and a perverse onus of proof upon a faultless injured worker. The injured worker may be completely faultless and merely following an employer direction when injured but unless the worker is prepared to take legal action to prove unreasonableness on the part of the employer, they will be excluded from Comcare.
13. We submit that such a proposition is at odds with the history and purpose of all Australian workers' compensation schemes.
14. The Bill further expands this exclusionary provision by allowing Comcare to rely upon management actions that are *yet to take place* to deny liability for a claim². That is, if an employer believes the worker's psychological condition is the result of anticipated action against them, such as a performance appraisal, the worker's claim will fail. Faced with such a decision, we expect a great number of injured workers will give up and employers will find a cost effective route to end an injured worker's employment. For those who seek to challenge such a decision, workers and the scheme itself are likely to face significant costs in litigation regarding how an action that is yet to take place, can be shown to be the cause of a medical condition. Similar difficulty will arise from the inability to assess whether an apprehended administrative action was reasonable in circumstances where no administrative action has in fact taken place.
15. Under the current scheme, a claim may be accepted where a worker seeks treatment for their psychiatric illness before the date of an unreasonable administrative action. In situations where a worker suffers a psychological illness as a result of bullying or harassment, excessive workload or exposure to traumatic events, the worker may experience symptoms such as fatigue, insomnia, irritability and inability to concentrate. These symptoms may lead to a decline in the worker's performance. The worker may subsequently be counselled for underperformance. Under the current scheme, where an injured worker seeks treatment for their illness *before* the management action, the claim may succeed subject to the other eligibility criteria. The Bill removes such claims.

'Designated Injury'

New section 5C

16. The Bill allows Comcare to specify certain injuries as 'designated injuries' and contains new definitions of 'designated injury' and 'relevant pre-existing ailment'.
17. There is a list of injuries identified in the Bill as being a 'designated injury', the Bill also allows Comcare to add to the list unilaterally by way of regulation³. 'Designated Injuries' will require a stronger causal connection with work than other injuries and again illustrates a move away from the concept of no-fault compensation for workplace injuries.

¹ Schedule 1, 9, 5A(2)(h)

² Schedule 1, 8, 5A(1)

³ Schedule 1, 15, 5C(1)(g)

18. That is, no longer will a worker be entitled to compensation for injury caused while at work and in the course of work, but rather will be required to establish that the injury was caused by what the worker was required to do at work. In light of the types of injuries identified by the Bill which in the main are very serious, evidentiary problems will be insurmountable for the worker.
19. Section 5C defines 'designated injuries' as injuries to:
 - (a) The heart;
 - (b) Blood vessel associated with the heart;
 - (c) The brain;
 - (d) Blood vessel associated with the brain;
 - (e) Intervertebral disc;
 - (f) Injury associated with intervertebral disc;
 - (g) Regulations may designate any bodily condition as a designated injury.

Susceptibility or vulnerability to injury

Item 10 inserts new paragraph 5B (2) (ba) and Item 11 inserts new paragraph 5B (2) (ca)

20. A long-standing principle of Comcare and injury law generally in Australia requires an injured person must be taken as they are – with all their vulnerabilities or susceptibilities.
21. The Bill changes that long-standing law and allows Comcare to consider the hypothetical state of the physical and psychological health of a worker *before* the injury and then make a further hypothetical assessment of the probability that the worker might have suffered the same or "similar" injury at "about the same time" or at "the same stage in life". Section 5B (2) (ba) requires that Comcare must take this into account in determining liability for an injury or illness.
22. The Bill allows any injury that can be said to be caused by or even merely "associated with" a pre-existing condition to be denied.
23. Older workers and workers with a pre-existing disability will be especially vulnerable to exclusion from compensation.
24. The explanatory memorandum at paragraph 24 explains further that;

"In assessing the contribution of the employment, this would require consideration of issues such as genetic pre-disposition, prior traumatic events, and personal and social factors which influence how a person perceives or experiences events to which they are exposed, whether that be in their employment or everyday life".
25. We envisage a very wide range of injustices will emanate from this provision. For example a worker from a non-English speaking background who has been subjected to ongoing domestic violence, may be devastated as a result of being victimised and sexually assaulted by her manager in her workplace. She is likely to be excluded from Comcare support because of her experiences in 'everyday life'.

Reasonable person perception test

Item 12 inserts new paragraph 5B (2) (da)

26. The current test for psychiatric injury is known as the *Weigand* test⁴. Whilst this test requires there to be a significant work event that contributed to the condition for liability to be accepted, it is not necessary to establish the worker's response was reasonable. The Bill removes this test and introduces an objective test that requires a worker to demonstrate there were reasonable grounds for the belief or interpretation of the incident or state of affairs⁵.
27. This is at odds with the fact that psychological conditions may of their nature not be rational. The Courts define a psychological condition as one that is 'outside the bounds of normal mental functioning'⁶. Consequently, this proposed test is flawed and inappropriate.

Compensation Standards

New section 7A

28. The Bill allows Comcare to create Compensation Standards by way of legislative instrument (regulations)⁷. These Standards will comprise certain factors to be considered by Comcare when deciding if an ailment exists for the purposes of eligibility for compensation. The Bill would allow Comcare to choose what is or is not an ailment without reference to accepted medical standards, by prescribing 'factors' that must exist before an 'ailment' can qualify for compensation.
29. This means that at any time, without reference to Parliament, Comcare can exclude injured workers from the scheme. As a result of Compensation Standards, an injury can be declared 'not an injury' and an ailment 'not an ailment' for the purposes of Comcare.
30. Compensation Standards can also set out matters that must be taken into account in determining whether an aggravation was contributed to by the 'significant degree' necessary to be able to access workers' compensation.

SCHEDULE 2 – Rehabilitation

Item 51 and Item 52, Sections 35, 36 and 37

31. Rather than focusing on the requirements needed to return an injured worker to full health *and* to work, the Bill firmly places return to work as the priority. The Bill takes guidance towards recovery away from the injured worker's treating doctor and places decision making in the hands of the employer and also Comcare.
32. The current scheme provides a solid framework for the worker's safe return to work. It also enables an employer to assess a worker's suitability to return to work (section 36), to direct them to return to work (section 37(1)) and to suspend their entitlements in the event there is no reasonable excuse for non-compliance (section 36(7)).

⁴ *Wiegand v Comcare Australia* [2002] FCA 1464

⁵ Schedule 1, 12, 5B(2)(d)(da)

⁶ *Comcare v Paul Mooi* [1996] FCA 1587 (26 June 1996)

⁷ Schedule 1, 14, 5B(3)

33. New section 41E gives Comcare the power to make rules affecting the liable employer by regulation. New section 70D foreshadows a 'Comcare Incentive Scheme for Employers' to meet the duties. On the other hand the new section 36A provides that the employee's duties are 'obligations' and failure will result in application of the new 'sanctions regime', detailed in Schedule 15 and which carry significant consequences and financial penalties.

Workplace Rehabilitation Plans

34. The Bill removes section 37 of the current scheme and in its place introduces the 'Workplace Rehabilitation Plan Framework', (Item 52, new section 36). The new term removes reference to treatment, focusing on the vocational nature of services. The Government cites the Hanks/Hawke Review as the reason for this.
35. The 'liable employer' – likely to be either the current employer or Comcare – does have duties in relation to rehabilitation and to take all reasonable steps to maintain the injured worker in employment (Division 2B new sections 35(J) and (K)) but they appear not to be enforceable duties.
36. The framework, to be prescribed at a later date by Comcare in regulations, permits an employer to create the set of obligations for a worker and permits the employer to direct the worker to engage in multiple assessments, medical appointments, "advice" about job modification, occupational rehabilitation, counselling, job seeking, participation in interviews and repeated functional assessments, amongst other things. The role and opinions of treating medical practitioners are minimised in the new framework.
37. New section 36H of the Bill requires the employer to consult with the injured worker's treating doctor and the employee on the 'Workplace Rehabilitation Plan Framework' but it is not necessary for the doctor's medical opinion or the concerns of the worker to be accepted by the employer. The Bill grants the liable employer power to direct the injured worker to undertake any work it deems suitable and appropriate.
38. Work capacity assessments can be ordered without limit under the new section 38B. Comcare will require the examining doctor or panel to complete a 'report' of work readiness, with Comcare able to make rules about the 'form and content' of the reports (new section 38C).
39. The Bill also significantly broadens the concept of suitable employment and provides the liable employer with the power to order an employee to carry out one or more job seeking activities (new section 36M). Rather than being limited to the liable employer who is responsible for the injury, suitable employment includes any job with any employer. This means liable employers can divest themselves of responsibility to provide suitable employment by passing the injured worker off to the job market at large, whether or not that market realistically has a job for the worker.
40. The Bill also permits an employer to vary or revoke the rehabilitation plan at any stage. Unlike the current scheme, which provides the worker with avenues for appeal, the Bill severely limits the power of the worker to challenge the employer's rehabilitation plan and imposes penalties on a worker for non-compliance. If unable to comply with the rehabilitation plan, the worker only has three business days within which to notify the employer of his or her inability to meet the requirements and this must be done in writing. Failure to comply with the rehabilitation plan means the worker is at risk of having their compensation payments suspended.

41. The Bill allows the 'liable' employer unfettered discretion to impose workplace rehabilitation requirements, whether or not the requirements could in fact be harmful. This will put many workers in an impossible position whereby they must either disobey the advice of their qualified medical practitioner or face sanctions and further financial penalty. Their right to challenge the reasonableness of directions given to them by their employer is removed by the Bill.
42. On the one hand, workers are faced with financial penalty and sanctions for failure (in the opinion of the employer) to adhere to their obligations, however, on the other hand, employers are to be provided with financial incentives to meet their obligations. Again, this is a further illustration of putting the interests of employers before the needs of injured workers and their families.

SCHEDULE 3 – Scheme Integrity

43. New section 58 of the Bill introduces a disturbing invasion of the right to privacy of an injured worker. The new section 58 enables Comcare or a 'relevant authority' to demand information from a worker within 14 days. Failure to do so without reasonable excuse will amount to a breach of an 'obligation of mutuality' and may mean a cancellation of the worker's compensation rights (new subsection 58 (1)).
44. No appeal mechanism follows where there is a genuine dispute in relation to whether certain information or a certain document is actually relevant to a claim. This is particularly important where information requests are worded broadly and would require an injured worker provide private and potentially irrelevant medical information to the relevant authority in whose hands privacy would not be guaranteed.
45. There is no obligation enshrined in the Bill that requires an employer to use the information for the purpose for which it was obtained.
46. The new section 58A takes the breach of privacy one step further in that it enables Comcare or the relevant authority to obtain documents about an injured worker from a third party. The Bill also enables the gathering of information without the permission of the injured worker from third parties.

SCHEDULE 4 – Provisional medical expense payments

47. We have previously advocated for the inclusion of the concept of provisional liability in the Comcare scheme. The Bill falls well short of what was recommended in the Hanks/Hawke Review and may have little if any practical effect. The reasons are twofold.
 - First, the Bill includes no appeal mechanism in the event an employer refuses to pay provisional medical expense payments; and
 - Second, provisional medical expenses are capped at \$5,000 (subsection 13 (1)) and this can only be requested once and in respect of medical treatment expenses only, there being no entitlement to any time off work payments.

SCHEDULE 5 – Medical Expenses

48. The current scheme entitles workers to the reasonable costs of medical treatment required because of their work related illness or injury. Medical treatment includes a range of treatment, usually directed by the injured worker's treating doctor in order to assist in the injured worker's treatment and rehabilitation.

Medical Expenses table to be set by Comcare without reference to reasonable costs

49. New section 16B proposes a table setting out costs that Comcare is prepared to pay without reference to discretion to cover what is reasonable. Consequently, injured workers are likely to be left with a gap or will only be treated by the pool of practitioners who are prepared to accept Comcare's pricing regime.

50. The medical expenses table provisions will interfere with the ability of treating doctors to direct care and treatment of their patients.

51. The current scheme allows an injured worker the right to accept or reject medical advice and it is only in situations where there is clear evidence of a failure to undergo curative treatment without reasonable excuse that compensation payments can be refused. In the event of a dispute, the worker has access to a right of appeal.

52. The Bill introduces the following significant changes to a worker's access to medical treatment, their right to choose a health practitioner and their right to have a say in the treatment they receive. A summary of how this will occur is set out below;

- a. 'Clinical Framework Principles' will be set by regulation and can only be prepared by Comcare. These Principles are to be used as the basis for Comcare determining what treatment can be provided and at what price (new section 16A);
- b. Comcare can create by regulation its own 'medical services table' to limit the payment of treatment costs (new section 16B);
- c. Comcare will 'designate' the doctors and clinics it is prepared to pay for treatment. An injured worker will be required to nominate a 'designated medical practitioner' or a 'designated medical clinic' with whom they are to seek treatment (new section 54A);
- d. Comcare can create its own 'Medical Treatment Reports Determination' to prescribe the form of medical reports and limit the payments made to a treating doctor who has been requested to provide medical information (new section 57B);
- e. Comcare can disclose information relating to an injured worker's medical treatment to a 'professional disciplinary authority' (new section 71A); and
- f. Comcare can obtain information from doctors directly and can force the injured worker to obtain and provide their doctor's private clinical notes. A failure to do so will lead to the worker being sanctioned (new section 115A).

Patient/Doctor confidentiality is withdrawn by the Bill

53. The current scheme protects the privacy of the doctor and patient relationship and it is only within the context of independent review at the Administrative Appeals Tribunal will that privacy be disturbed. Even so, injured workers are still afforded protection against an unrestricted use of material summonsed by Comcare or the employer.

Medical Services Table, Medical Treatment Reports Determination and Medical Examination Rates Determination

54. By imposing limits on the payment of medical treatment expenses, the worker and their family, will be left to pay the shortfall. This will lead to workers either deferring treatment, which will ultimately lead to their injuries becoming entrenched and impacting on their capacity for work, or being forced into debt to pay the escalating costs.
55. The proposed 'Medical Treatment Reports Determination' limits the costs payable to a treating medical practitioner who responds to a request for report by a relevant compensation authority. However, the cost of reports obtained from medico-legal examiners engaged by the same compensation authorities, are not so limited. The opinions of those medical practitioners who undertake treatment of injured workers is therefore under-valued in favour of non-treating commentators who have no responsibility for treating the injured worker.

Designated Medical Practitioner or Clinic

56. The Bill requires an injured worker nominate a 'designated medical practitioner' or a 'designated medical clinic' when making their claim for compensation.
57. The nomination is relevant to the payment of medical expenses as only those expenses incurred following the prescription by a designated medical practitioner or clinic, count as medical treatment for the purpose of payment by Comcare.
58. The Bill seeks to establish a regime whereby for each different practitioner who may become involved in the case, the injured worker must revoke a prior designation and designate a new practitioner or clinic. The nomination must be made *before* the prescription of any medicine. This proposal is grossly unfair because in many cases, the prescription of medication is made by a number of treatment providers such as a General Practitioner and a Specialist, both of whom may deal with a separate and discrete part of the injury. However, the Bill suggests that the injured worker would only be able to get compensation for certain medicines prescribed by one designated practitioner.
59. The Bill unfairly limits the injured worker's freedom to seek treatment from medical practitioners of their choice and significantly increases the bureaucratic costs.

Sanctions for rejecting medical advice

60. An injured worker who rejects medical treatment advice from a designated 'legally qualified medical practitioner' which is determined to be 'reasonable' will have breached an 'obligation of mutuality'. Such a breach can give rise to the cessation of compensation payments.

Health and well-being of injured workers may be put at further risk by the Bill

61. Comcare, not the medical profession, will guide decision making about medical treatment without reference to the individual condition of the worker. Both the treating doctor and the injured worker are bound to accept Comcare's treatment decisions. Should the treating doctor recommend another form of treatment, the injured worker will need to bear those costs.
62. We have deep concerns this will lead to a failure to treat injuries and potentially mistreating injuries in a misguided attempt to follow a Comcare defined, 'Clinical Framework Principles'.
63. The Clinical Framework Principles cannot be challenged. They will be defined by legislative instrument.

64. The 'legally qualified medical practitioner' referred to in the Bill is not defined as a treating doctor. Rather, a medico-legal commentator, not charged with the responsibility of treating the patient, may be so considered. Such a proposal would allow substitution of opinion from non-treating doctors over those of treating doctors who have the duty for providing medical care for their patient.
65. Already, there is a large population of doctors who refuse to become involved in the compensation process. The Bill will make the situation worse and will eventually see workers being managed by employer and Comcare-funded practitioners. This situation will not only deliver less effective treatment owing to the lack of knowledge of the worker's condition but will create a significant conflict of interest.

SCHEDULE 6 – Household Services and Attendance Care

66. Under the current scheme, where a worker's injury results in significant incapacity and disability that prevents them undertaking household duties or requires attendant care, Comcare or the relevant authority is obliged to provide for the reasonable costs of such services (current section 29). Specific Comcare accreditation is not required and in some situations, family members may be paid for providing attendant care services.
67. The Bill seeks to introduce the following changes:
 - a. Introduces a formal Comcare system of accreditation, approval and registration of attendant care service providers (new sections 29D, 29E and 29F). This will lead to an inability of family members to be paid for providing such services (unless they become accredited, approved and registered);
 - b. For those suffering a condition other than a condition deemed 'catastrophic', irrespective of need, compensation for attendant care ceases three years from the date of injury or six months post discharge from hospital (new subsections 29(5) and (5A));
 - c. What is a 'catastrophic injury', and therefore not subject to a specific timeframe is not defined and is left to regulation. The explanatory memorandum says at p.50 the definition will be based on the National Injury Insurance Scheme (NIIS). It is noted the term catastrophic injury in the context of the NIIS is for the purpose of determining eligibility for the scheme, not for determining what type of services are needed and for what duration.
68. There is no basis for limiting services to a period of three years following injury. Removing an entitlement will lead to hardship and unmet needs and will transfer the cost onto families, the National Disability Insurance Scheme or local services that are unlikely to have sufficient resources for extra Comcare clients.
69. Cutting care to those workers considered to have 'non-catastrophic injuries, after three years, are likely to lead to significant hardship. It is unclear whether a single amputee will satisfy the criteria, which is yet to be determined. It would seem grossly unfair if someone who was without an arm or without the use of hands were denied ongoing services.
70. Whilst we fully support the goal of a trained and professionally recognised attendant care workforce, the creation of a new accreditation, approval and registration processes for attendant carers will only increase the bureaucratic process, increase costs for the scheme and slow the delivery of needed services.

71. There have been cases where family members, owing to the particular circumstances, are appropriate as attendant carers. This is partly due to the fact they provide such services on a continuing basis. When such family members forego employment opportunities, the family income suffers at a time when the injured worker will not be able to earn full wages.
72. Removing family members from the field of compensation will be detrimental to the care of many long-term injured workers. The current provisions allow for such family members without requiring the claimed entitlement to be justified by reference to undefined 'special circumstances'.
73. The provision is thereby merely an attempt to remove family members from the field of potential carers whose services may be compensated. One wonders whether faced with the decision to see alternative, accredited services, families may choose to continue providing services. Such a situation will save Comcare money but will lead to charities, which are already stretched, taking up the slack.

SCHEDULE 7 – Absences from Australia

74. The Bill proposes new subsection 29K (1) to suspend compensation entitlements where an injured worker is absent from Australia in excess of 6 weeks for private purposes. In circumstances where a worker is totally unfit for work as a result of a compensable work related injury, it matters not whether the worker lives in Australia or elsewhere. There is no justification for this amendment.

SCHEDULE 8 – Accrual of leave while receiving compensation

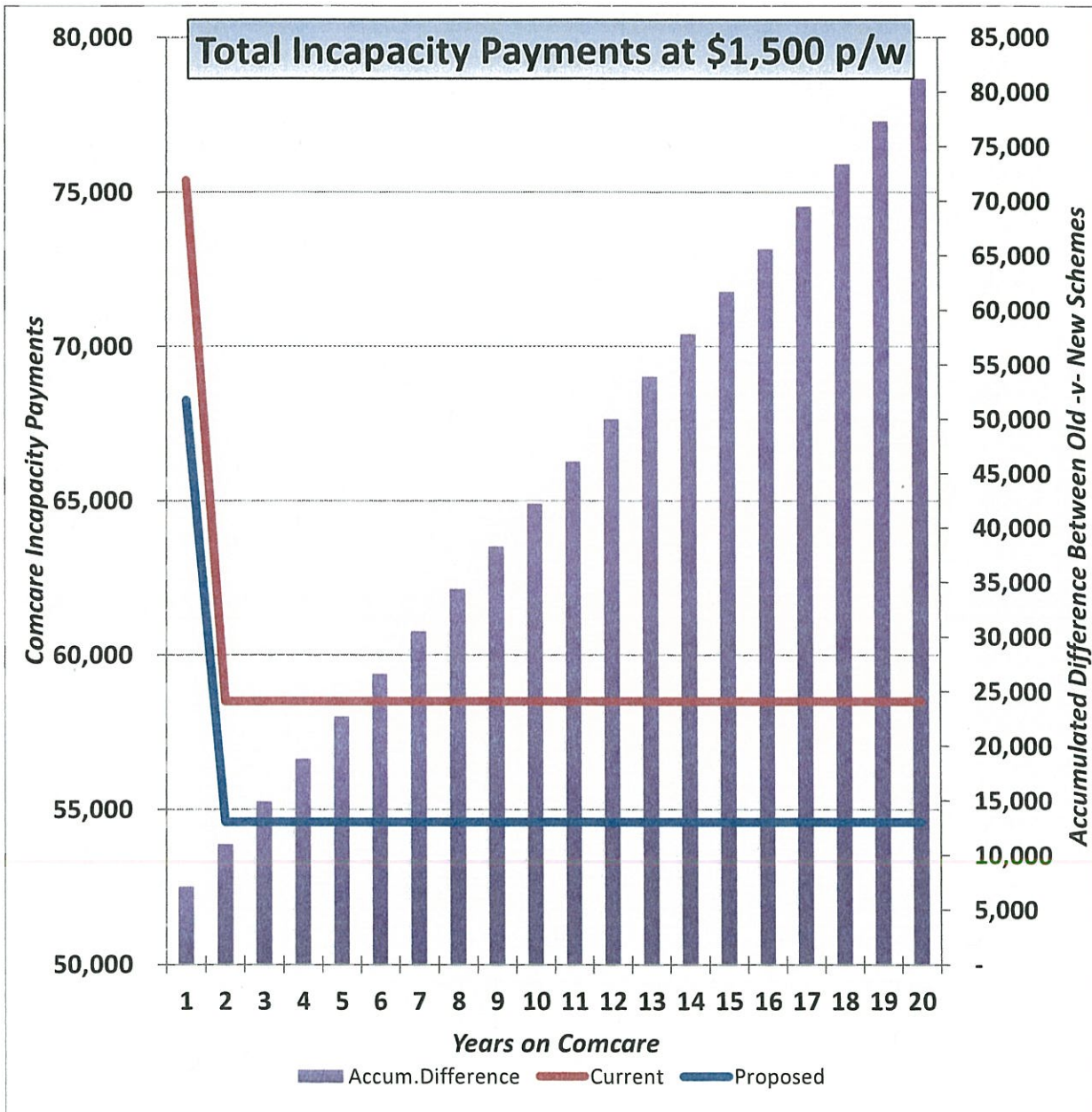
75. The Bill proposes to prevent those who are unable to work, or only partially able to work, as a result of a work injury, from accruing leave entitlements under their workplace agreement and the Fair Work Act. We note that in another Bill, the Government is proposing to end the accrual of leave entitlements under National Employment Standards within the Fair Work Act for all workers' compensation schemes. This places injured workers at a significant disadvantage compared with their colleagues who are able to accrue sick leave, long service leave and annual leave in the same period. There is no justification for this financial penalty against workers. This amendment effectively punishes workers for sustaining an injury.

SCHEDULE 9 – Calculation of compensation

76. The Bill significantly reduces incapacity payments to workers in a number of ways.
77. First, the Bill introduces earlier step-downs. This will have a disproportionate financial impact on the seriously and permanently injured.
78. The current scheme provides a worker is entitled to their Normal Weekly Earnings (NWE) for the first 45 weeks of incapacity and thereafter 75% of their NWE until 65 years of age, assuming they remain totally incapacitated for work. The Bill introduces step downs earlier as follows:
 - a. 1 to 13 weeks = 100%
 - b. 14 to 26 weeks = 90%
 - c. 27 to 52 weeks = 80%
 - d. Over 53 weeks = 70%

79. In order to understand the effect of the reduction, we provide the following case study and complementary graph.

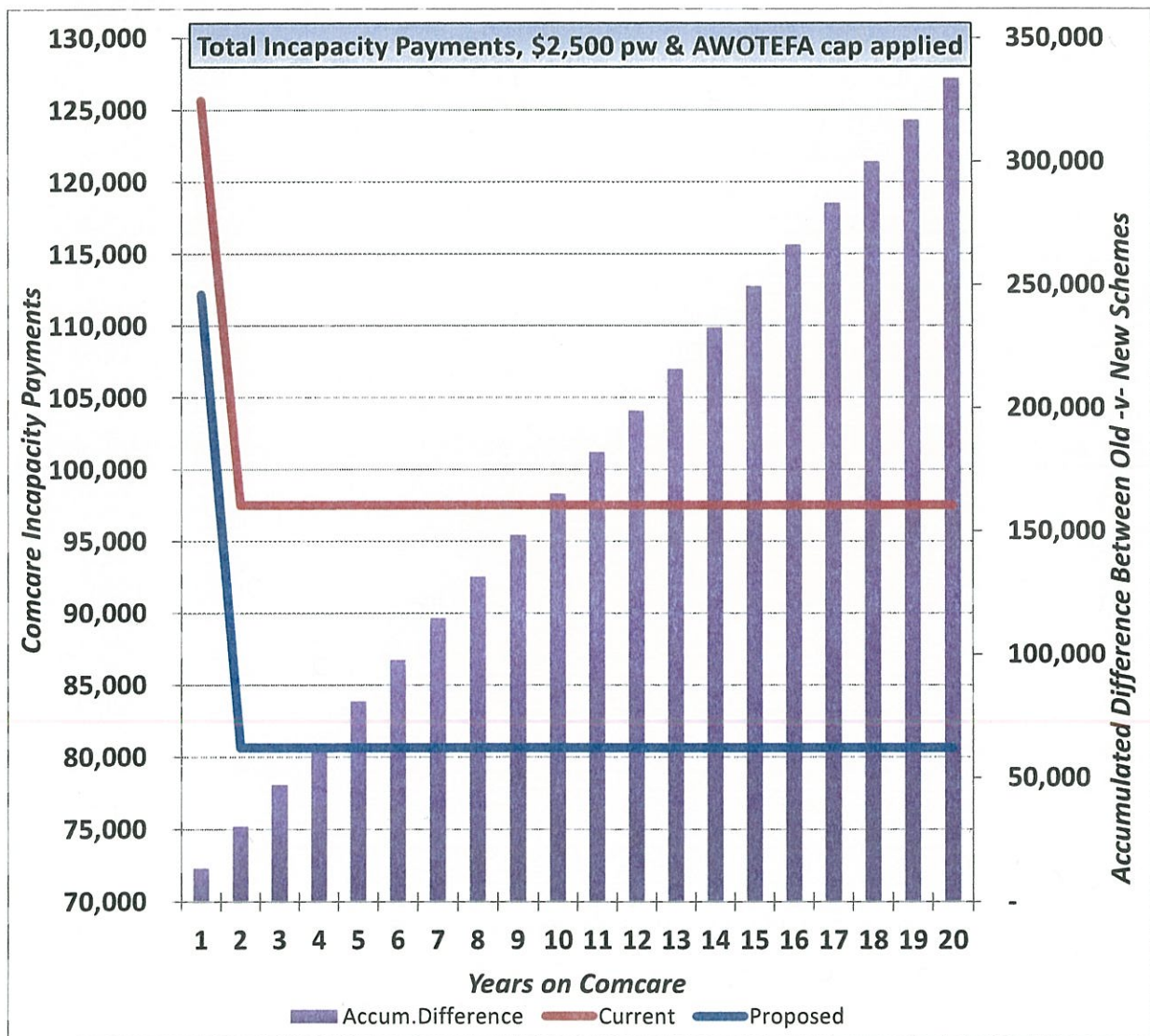
Mark is 45 years of age and works as a packer. Whilst removing a package from a forklift, he suffers a sharp pain in his lower back followed by pain running down his leg. He is diagnosed with a disc herniation at L5/S1 and undergoes surgery. Despite surgery, Mark suffers ongoing pain and disability and is certified totally unfit for work.



80. Second, the Bill introduces the cap on incapacity payments at an earlier date. The current scheme applies a cap on incapacity payments based on 150% of the *Average Weekly Ordinary Time Earnings of Full time Adults* (AWOTEFA) after the step down comes into effect at 45 weeks. By introducing a step-down at 13 weeks, the Bill applies that cap after only 13 weeks. This will increase the financial impact on those suffering from accepted compensable illnesses.

81. In order to understand the effect of the reduction, we provide the following case study and complementary graph.

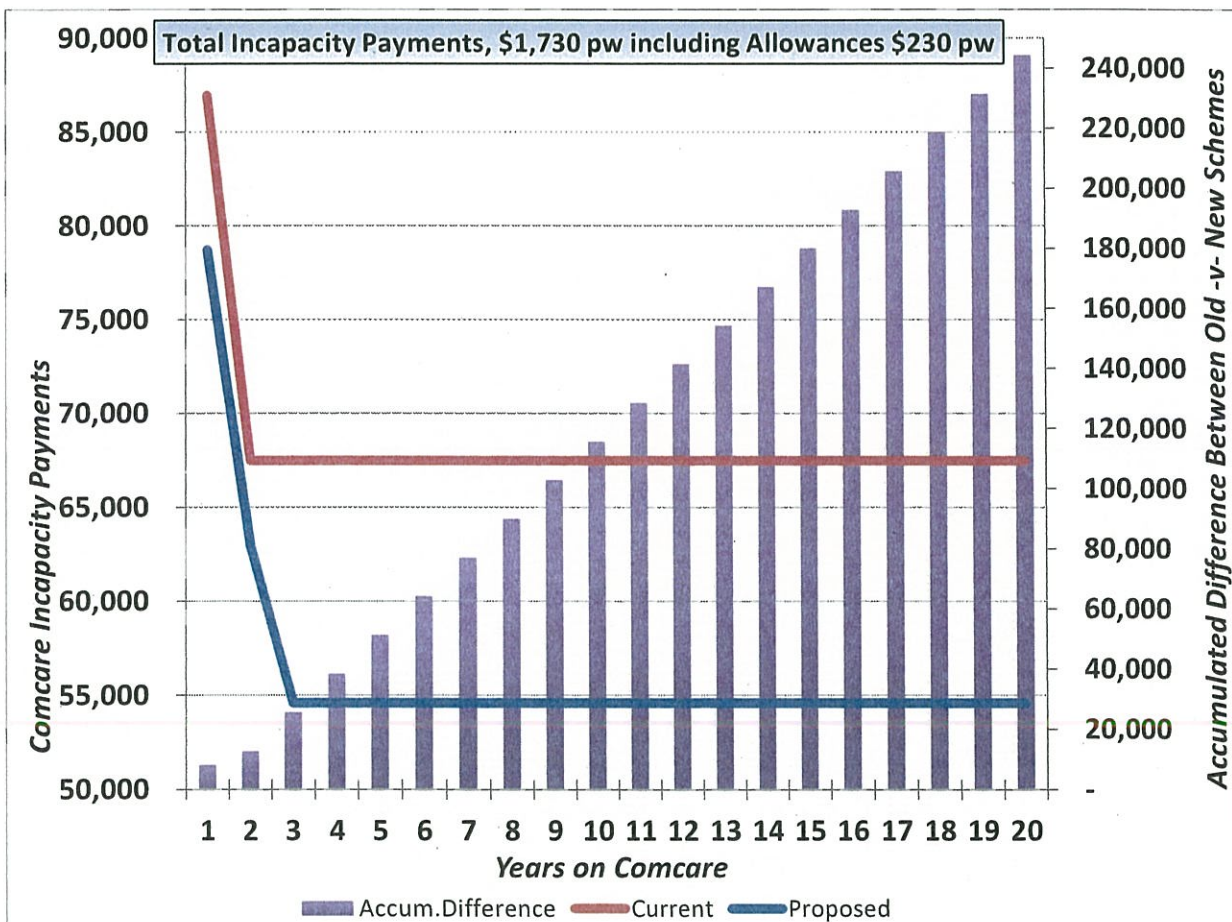
Craig is 45 years old and works for a construction company as a scaffolder/rigger. Craig is earning \$2500 gross per week. Craig falls from a scaffold and injures his right knee and lower back. Craig undergoes surgery on his knee and is totally incapacitated. Craig's back injury, which at first appeared muscular in nature, turns out to be structural and he later undergoes surgery. Craig is deemed totally incapacitated for work.



82. Third, the Bill cuts workers entitlements to eligible allowances. Under the current scheme, there is no timeframe applied to whether allowances are included in a workers entitlement. The Bill only permits such entitlements to be included in the calculation of their incapacity payments for the first 104 weeks after an injury. In addition to the limit on the number of weeks, the allowances will only be included if the worker would have worked overtime during those 104 weeks.

83. In order to understand the effect of the reduction, we provide the following case study and complementary graph.

Shane is 45 years of age and is a fire fighter. Craig is earning \$1730 per week plus \$230 per week in allowances. Shane suffers a neck injury whilst pulling a fire hose during the course of a fire drill. Shane undergoes surgery on his neck at in the form of C6-7 anterior cervical discectomy and fusion and now suffers from severe constant pain. Shane is deemed totally incapacitated for work.



The old scheme allows for 100% of all pre-injury income for 45 weeks and 75% thereafter. The new scheme provide 100% (1st 13 weeks), 90% (next 13 weeks), 80% (for the next 26 weeks) and 70% after. In addition, after the first 104 weeks, and any allowances which were were part of the income are excluded in assessing the weekly incapacity payments. Based on a worker earning \$1,730 per week (including allowances of \$230 per week), under the old scheme, the compensation would be \$86,933 for the 1st year and \$67,470 for each year thereafter. Under the new scheme, the compensation would be \$78,715 (1st year), \$62,972 (2nd year) and \$54,600 for each year thereafter.

SCHEDULE 10 – Redemption of compensation

84. The current scheme provides a set of criteria that must be satisfied for a worker to redeem his or her incapacity payments. The very restrictive set of criteria together with the ease at which a worker may reinstitute payments has meant the current redemption mechanism is very rarely used.
85. The Bill amends paragraphs 30(1) (b) and 137(1) (b) to increase the redemption amount payable from \$110.65 to \$208.91 per week. This modest increase could best be described as tinkering.
86. However, the Bill fails to allow workers to redeem payments on a voluntary basis and does not provide a realistic mechanism for enabling a worker to separate from the system. The Bill, therefore, falls short of what is required to make the redemption provisions meaningful.

SCHEDULE 11 – Legal Costs

87. The Bill proposes to allow Comcare to prescribe the legal costs of injured workers by a disallowable legislative instrument. Costs should be set by an independent body as is currently the case, and not Comcare.
88. Under the current scheme injured workers face regulated costs. There is a three stage decision making process. The first two tiers are internal. The primary decision ('Determination') must be reviewed by a second-tier, review officer. It is only after that review decision is made ('Reviewable Decision') that the worker can seek a review of the decision at the Administrative Appeals Tribunal.
89. The Bill seeks to amend the current scheme as follows:
 - Introduces a Comcare determined 'Schedule of Legal Costs' (new subsection 67A);
 - Enables Comcare to reimburse a worker for some legal costs incurred in the internal review process, but only on the condition they surrender their rights of review by the AAT (new section 62A); and
 - Enables the AAT to order a worker to pay Comcare's legal costs if they are unsuccessful (new subsection 67(10B)).
90. At present, a worker can only make a claim for a portion of his or her legal costs if they are successful at the Administrative Appeals Tribunal (AAT). Success is defined by either the decision being set aside or being replaced with a more favourable decision. In order to determine a worker's claim, Comcare has regard to an already discounted legal costs schedule, that being 75 percent of the legal costs outlined in the Federal Court Scale. The worker is not entitled to any costs which may have incurred before the commencement of any Tribunal proceedings.⁸

Access to Justice

91. The Schedule of Legal Costs will lead to workers being unable to afford legal representation. This will mean only those who can afford it will have legal representation. Those who cannot afford to pay may either forego their review rights or represent themselves.
92. Institutional parties stand to leverage an even greater litigation advantage if injured workers are unable to have their legal costs met on an equal footing.

⁸ *Comcare v Con Labathas* [1995] FCA 1702 (30 November 1995)

93. The requirement to pay Comcare's legal costs will further prevent workers making valid appeals. The current scheme permits the Administrative Appeals Tribunal to dismiss a claim if it considers it to be false and vexatious. This is sufficient to protect the scheme against unmeritorious claims.

Increased Legal Costs for Comcare

94. For those who cannot afford legal costs, they may seek to represent themselves. This is becoming an increasing phenomenon in the Comcare process. Anecdotal evidence suggests that such matters are more lengthy and costly than those where the worker has legal representation.

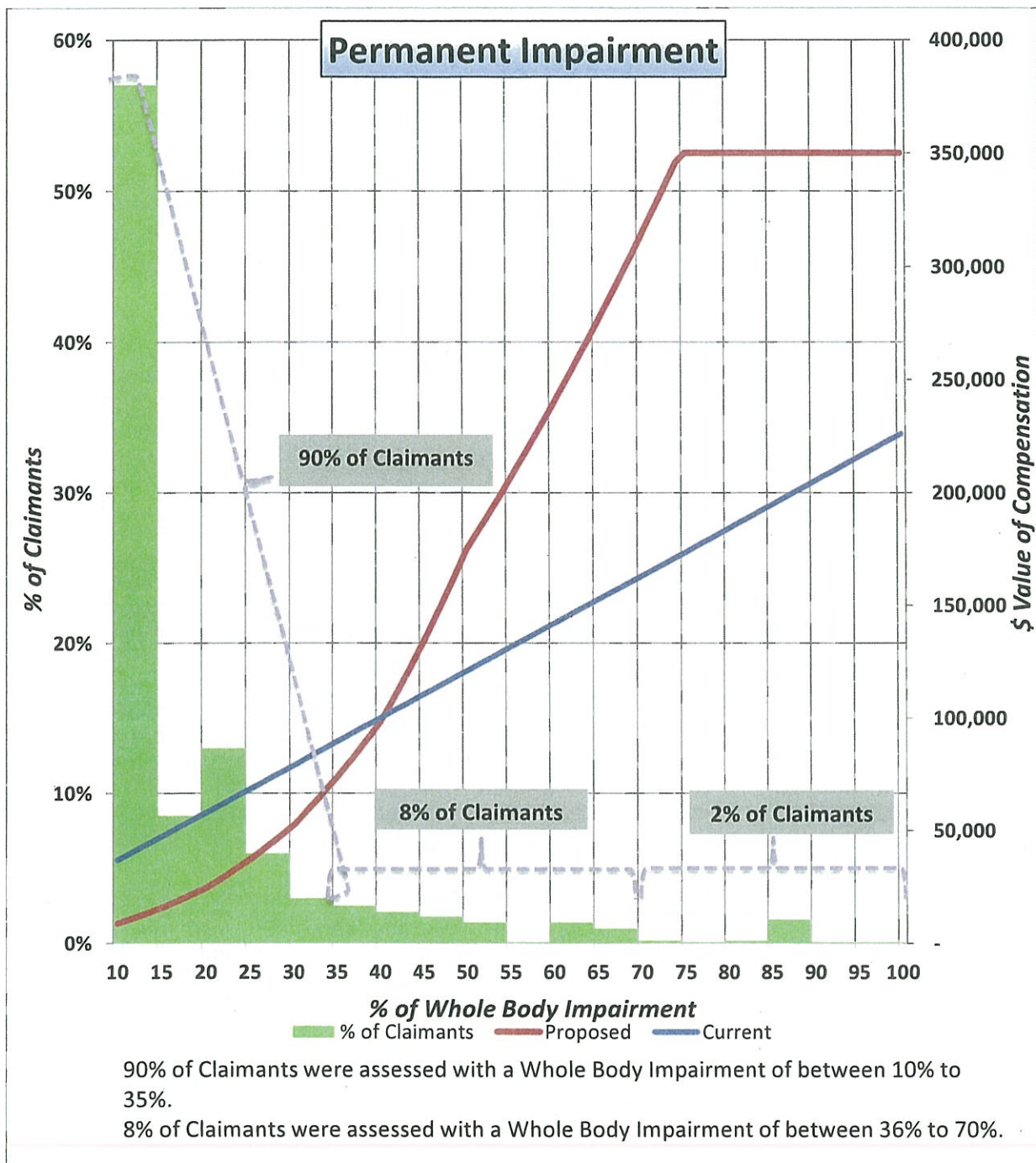
Discretionary costs at second stage erode true right of independent review

95. Conferring discretionary power on Comcare to allow the recovery of costs leaves workers in a very vulnerable position.
- a. There is no independent body able to oversee the award of legal costs;
 - b. The legal costs may not reflect the true value of the services;
 - c. The award is completely discretionary;
 - d. The discretion is exercised by the very body whose erroneous decision is to be replaced.

SCHEDULE 12 – Permanent Impairment

96. The Bill reduces permanent impairment benefits for the vast majority of injured workers. The very few that receive a higher benefit will have this more than off-set by the losses they will incur because of the cuts to incapacity payments in Schedule 9.
97. When the Comcare scheme was introduced in 1988, the Parliament increased workers' entitlement to a lump sum impairment payment in part to offset their relinquishment of common law rights. This should not be forgotten when reviewing the benefits available to injured workers under the scheme.
98. The Government has sought to justify this Bill by making a simple comparison between the benefits across all workers' compensation jurisdictions without consideration of the relinquishment of common law rights under Comcare. All State and Territory schemes continue to include common law rights albeit with differing thresholds.
99. Insofar as the nature of the reductions to permanent impairment benefits, the Bill significantly reduces entitlements in several ways.
100. First, the Bill dramatically cuts payments to those suffering impairment less than 40%, around 90% of claimants. The following graph compares payments under the current scheme⁹ and those proposed under the Bill.

⁹ Based on Non-Economic Loss Questionnaire scores of Pain = 3, Suffering = 3, Mobility = 1, Social Relationships = 3, Recreational Activities = 3



101. The Government has claimed the Bill makes the system fairer by delivering more compensation to workers with significant injuries. A large number of workers are already excluded from compensation owing to the tough criteria needed to reach a 10% Whole Person Impairment (WPI). Comcare introduced the Second Edition of the *Guide to the Assessment of the Degree of Permanent Impairment* (“the Guide”) in 2006 as a cost saving mechanism. The result was an immediate reduction on claims by 68%¹⁰. Modelled on the American Medical Association’s *Guide to the Evaluation of Permanent Impairment, Fifth Edition* (“AMA V”), the Guide removed the ability for many workers to make a claim owing to the high threshold required for 10% impairment.

¹⁰ Based on accepted claims in the period 06/08 compared to 04/06, *Policy Review of Comcare’s Permanent Impairment Guide Options Paper*, Submission of the Australian Council of Trade Unions, 28 August 2009.

102. To illustrate the nature of the injuries affected by the Bill and in particular how the Bill in fact cuts payments to severely injured workers, we provide the following case studies:
- a. Katy is a 32-year-old nurse and injured her back when a patient fell on her while she was assisting the patient move from the bed into a chair. Katy underwent surgery in the form of L5-S1 anterior interbody spinal fusion, L5-S1 synfix segmental fixation, L5-S1 complete discectomy and open neurolyses of nerve roots. Katy is now in constant pain, is unable to participate in any pre-injury recreational activities and has become a social recluse. Katy has developed major depression as a result of her back injury. Katy is awarded a 23% WPI for her back pursuant to Table 9.17 of the Comcare Guide. Under the current scheme, Katy would be entitled to approximately \$65,000 in respect of her back injury. Under the proposed scheme, Katy's entitlement would be reduced to \$31,797.50. Katy's loss is **\$33,202.50**.
 - b. Barry is former fire-fighter and has been diagnosed with prostate cancer which has been accepted as a work related injury due to his exposure to chemicals during the course of his employment. Barry lives with daily pain and restrictions and his life expectancy has been significantly reduced as a result of the cancer. Barry has been diagnosed with major depression. Barry is assessed as suffering from a 15% impairment under Table 11.1.4 of the Comcare Guide and is awarded approximately \$44,000. Under the proposed scheme, Barry would only be entitled to \$15,750. Barry's loss is **\$28,250**.
 - c. Bob is a telephone technician and suffered an injury to his back when he fell off a ladder during the course of his employment. Bob underwent surgery in the form of C6-7 anterior cervical discectomy and fusion and now suffers from severe constant pain in addition to panic attacks and being hypersensitive to touch. Bob is assessed as suffering from a 28% WPI under the current scheme and awarded approximately \$76,000. Under the proposed scheme, Bob would be entitled to \$46,060. Bob's loss is **\$29,940**

Unfair treatment of psychiatric injuries

103. The Bill eliminates any lump sum payments for permanent impairment and non-economic loss for those suffering from a secondary psychological condition (new section 28C). It is not uncommon for the secondary psychological effects of a condition to be significantly distressing. Overlooking the psychological affects when assessing compensation for permanent impairment devalues psychological illness and takes us back to a time where psychological conditions were considered less important or less real than physical conditions.
104. In order to illustrate the types of people caught by this exclusion, we refer you to the examples outlined in 77 above. Under the current scheme, both Katy and Barry are assessed as suffering from 10% impairment in accordance with Table 5.1 of the Comcare Guide. This would entitle both to a separate payment of approximately \$36,000. Under the proposed scheme, Katy and Barry would be entitled to \$0.
105. The removal of a secondary psychological lump sum payment has a significant impact on those workers whose physical injuries do not meet the tough criteria or whose injuries are not properly covered by the Comcare Guide¹¹. For those workers who cannot obtain a lump sum payment for their physical injuries, their only means of being awarded a lump sum payment is

¹¹ For example, the Act provides that a worker can seek a lump sum payment for a chronic pain condition. However, the Guide specifically excludes lump sum compensation for chronic pain conditions and states AMA 5 cannot be used to assess permanent impairment with respect to chronic pain conditions.

by way of a secondary psychological claim. We provide the following case studies to illustrate the point:

- d. Tom is a truck driver. Whilst moving a pallet during the course of his employment, the worker assisting him, let go, leaving Tom to take the whole weight of the pallet. Tom was unable to support the weight and sustained a severe sudden onset of pain in the inguinal region. Tom underwent surgery for repair of both left and right hernias. The hernias were repaired but subsequent to the surgery, Tom developed sharp bilateral pain directly over the internal inguinal ring bilaterally running to the upper medial part of the thigh bilaterally. The symptoms were considered not to be a recurrent hernia but rather a "neuroma" associated with scarring in the iliohypogastric nerve. Tom was assessed as suffering from a nil % in accordance with tables 8.7 and 9.13.3 of the Comcare Guide and owing the inability to claim for chronic pain under the Guide, was unable to make a claim for the injury, notwithstanding its severity. Tom's only avenue for a lump sum payment was via a psychological claim. Tom satisfied the 10% threshold required for a permanent impairment payment for his psychological condition and is awarded approximately \$36,000. Under the proposed scheme, Tom would have no entitlement to a lump sum payment.
- e. Rose is a postal worker and suffered an injury to her neck whilst sorting mail. The injury in her neck caused Rose to suffer from significant radicular pain and loss of function in her right arm. Rose is unable to make a claim for her neck as she does not reach the 10% threshold under Table 9.15. Rose is also precluded for making a claim under Table 9.14 of the Comcare Guide in respect of the radicular pain in her right arm owing to the requirement for the impairment to arise in the arm. Rose developed major depression as a result of the physical injury and satisfied the 10% threshold required for a permanent impairment payment for her psychological condition and is awarded approximately \$36,000. Under the proposed scheme, Rose would have no entitlement to a lump sum payment.

Recognition of pain and suffering abolished

106. The current scheme provides for a permanent impairment payment commensurate with a worker's individual experience of pain and suffering. Having reached the 10% threshold, a worker completes a Non-Economic Loss Questionnaire and is asked a series of questions about how the injury has impacted on such aspects as pain, suffering, mobility, social relationships, recreational activities and life expectancy. The worker and their treating doctor make an assessment of the impact. The worker is thereafter awarded a payment consistent with the evidence.
107. The Bill removes a worker's entitlement to such a payment by dissolving this compensation into the permanent impairment assessment. In doing so, there is no consideration of the individual response to an injury, which can differ quite significantly from person to person. Further, with the elimination of permanent impairment payments for secondary psychological conditions, those experiencing permanent psychological distress will no longer be entitled to any compensation for their psychological aspects of their injury.

SCHEDULE 14 – Gradual Onset Injuries

108. This schedule clarifies that responsibilities for managing a claim for gradual onset injuries will rest with the most recent employer. Liability for payment of compensation will be allocated among employers and new Division 5A to be inserted into Part VIII of the Act provides mechanisms for this.
109. Eligibility will still depend upon whether the injured worker can prove the gradual onset injury was contributed to by a 'significant degree' by the worker's employment with the relevant authority responsible for the last employment that made a significant contribution to the gradual onset injury. It is obvious that this will be an extremely difficult hurdle for workers with 'gradual onset injuries'. This is particularly the case given the different eligibility criteria in other state and territory schemes. We envisage that those workers who cross state and federal workers' compensation schemes may fall through the cracks and be denied compensation for what should be a work-related injury.

SCHEDULE 15 – Sanctions

110. The Bill allows decision makers (licensees and public sector agencies) to determine and report breaches of obligations and responsibilities and these breaches trigger the new 'sanctions regime' for alleged failure to meet an 'obligation of mutuality'. New section 29U makes clear that failure without 'reasonable excuse' to comply with 'obligation of mutuality' requirements are strictly subject to a sanctions regime.
111. The 'liable employer' may consider whether the breach has a reasonable excuse and if they consider it does not, must report the breach to Comcare on a strict liability basis. The Bill does not allow the personal circumstances, vulnerability, or the health and disability of the injured worker to be taken into account, despite the punitive consequences which are 'cancellation' of the right to pursue any form of compensation for the injury, whether or not the injury was caused by the gross negligence of the employer.
112. The Bill makes clear that common law rights are also extinguished by the insertion of 29G. This means that a permanently and seriously incapacitated worker – injured as consequence of the unlawful wrong doing of others – can lose the rights that every other citizen has to hold the corporation or individual that has harmed them to account. In our submission this is highly discriminatory and punitive.
113. Whilst workers have an ability under the Bill to challenge an employer's or Comcare's sanction decision at the Administrative Appeals Tribunal, they will be without income as their benefits are cut off automatically. Therefore, such workers will not have the resources to challenge Comcare unless their Union or lawyers assist pro bono. As this is new and untried law, disputes may be lengthy and costly with recourse possible only to the Federal Court.
114. It is expected the majority of workers will not be in a position to oppose sanction decisions thereby giving employers a new mechanism to terminate the employment of many injured workers without a fair process.

115. There is no policy basis upon which preventing a seriously injured citizen whose injury has been caused by work, to be left without any income, not even social security unless they qualify for the disability pension.
116. Sanctions may be applied against an injured worker in many circumstances including but not limited to the following:
- a. Failure to comply with a requirement under Section 50 where Comcare makes or takes over a third party claim;
 - b. Where a diagnosis is not made by a psychiatrist within 12 weeks for a claim for a psychiatric illness;
 - c. An alleged failure to accept suitable employment;
 - d. An alleged failure to seek suitable employment;
 - e. Refusal or failure to undergo a medical examination;
 - f. Absence from work without a medical certificate;
 - g. An alleged failure to follow medical treatment advice (unless the failure is while obtaining a second opinion);
 - h. An alleged failure or refusal to attend an assessment regarding the need for household and/or attendance care services;
 - i. An alleged failure to fulfil the responsibilities of a Workplace Rehabilitation plan;
 - j. An alleged failure to undergo or fully cooperate with a readiness assessment;
 - k. Alleged failure to comply with a notice requesting information.
117. The Obligations only apply to workers and are poorly defined. The 'breach' provisions will have an extremely harsh economic, social and health impact.
118. There are no sanctions imposed on employers for failure to meet their rehabilitation obligations. Sections 35J and 35K of the Bill require liable employers to take all reasonable steps to rehabilitate a worker and provide suitable employment. However, no sanctions are imposed on an employer who fails in their obligation.

SUMMARY

This Bill offends basic and historical principles of workers' compensation. The extent of the imbalance in the Bill and the punitive approach it takes to injured workers has no place in a civil system of law.

The cuts to workers' entitlements cannot be justified in terms of policy objective nor legal basis and are solely a reflection of a desire to save public sector agencies money and possibly to placate some employers. The reality is, however, this Bill will not prevent injuries or reduce the length of injuries. Rather, it will shift the burden to the public system and see greater pressure being placed on injured workers, their families, charities and the public system.