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Undermining the Comcare scheme

Submission to Senate Education and Employment Legislation Committee
Inquiry into *Safety, Rehabilitation and Compensation (Improving the Comcare Scheme) Bill* 2015 (Cth)

27 April 2015

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WHO WE ARE

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

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

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

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

OUR STANDING TO COMMENT

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

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

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

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

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

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

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INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Education and Employment Legislation Committee in its inquiry into the *Safety, Rehabilitation and Compensation (Improving the Comcare Scheme) Bill* 2015 (Cth) ("the Bill").

The introduction of this legislation is strongly opposed by the ALA in its entirety.

We submit that the Bill has either ignored or entirely contradicted recommendations put forward by Mr Hanks that ensured the fast and balanced rehabilitation of workers back into the workforce. The proposed changes in the Bill put the considerations of big business ahead of those of injured workers.

ELIGIBILITY FOR COMPENSATION

It is already inherently difficult for workers covered under the Comcare scheme to gain access to compensation. The Bill introduces a number of changes which will make it even harder for genuine claimants to gain urgent and necessary access to benefits.

Removing access to rehabilitation and retraining for the older workforce

The Bill proposes to introduce a new test which allows decision makers to reject compensation for injuries that are likely to have been sustained at or about the same time in the worker's life.[2] This means that, despite a worker clearly suffering a work related injury, an employer can shirk responsibility by contending that, because of his or her age, they probably would have suffered the injury anyway.

This test is clearly intended to limit employers' responsibility to rehabilitate and retrain the older workforce. In an era where age pensions are having a severe impact on the Commonwealth purse, we should be making changes which would make it easier for the older generation to stay in the workforce, not harder. Exclusion of older workers from rehabilitation and vocational retraining is simply going to force workers into early retirement.

(*Please note, all case examples within this submission are hypothetical examples that may be drawn from the proposed changes*.)

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Case Example 1

John is 55 years of age, and has been working as a truck driver for a large transport company for over 30 years. He has not done anything else and because of his time at the company, he has not developed any computer skills, a necessary skill for alternative employment.

John has never had any problems with his back before, but one day whilst at work, the forklift was broken, so his manager gets him to lift some goods directly from the pallet into the truck. As a result he severely injures his back to the point where he can't go back to work as a truck driver.

John has a mortgage, wife and three children who are still at school. He needs to keep working and so he lodges a Comcare claim for assistance with developing his computer skills and help with him transition into a lighter job.

Under the new proposals, his employer can reject his claim because a doctor says that he is at an age where people's backs start to go. His employer then terminates his employment and he is stuck trying to feed his family on welfare benefits.

Reasonable Basis Test

The second alarming proposal is the introduction of a "reasonable basis" test towards psychological injuries. This means that if someone is psychologically injured due to a series of events that happened in the workplace, compensation will only be payable if that person's belief or interpretation of those events has a reasonable basis.

This is a deeply concerning and dangerous change. Many people faced with difficult, urgent and threatening situations at work are likely to be judged by decision makers with the benefit of hindsight. Decision makers are essentially asked to retrospectively analyse a situation and form a judgement concerning how someone should have reacted objectively.

Moreover, the entire concept of anchoring a psychological injury to the concept of "reasonableness" sits uncomfortably with the notion that someone with a psychological impairment must, by virtue of the definition of injury, suffer a condition outside the boundaries of normal mental functioning.[3] The proposed legislative change is both illogical and has the potential to drastically restrict legitimate access to compensation.

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Case Example 2

Jessica works as a Customer Service Officer at the front desk of one of Centrelink's branches. This branch has a many number of welfare recipients who suffer mental illness and there have been previous instances of aggression.

One day, a welfare recipient who is known by the branch to have mental issues and has displayed aggression enters the branch. Jessica is at the front desk and sees him approaching her. She notices the outline under his jacket which she thinks looks like a gun. The man continues to approach her, and in her petrified state she pushes the panic button. She has a breakdown and suffers recurrent nightmares over the incident, which requires urgent and immediate treatment for PTSD and time away from the Centrelink branch.

She claims compensation and the decision maker looks into the investigation report over the incident. It was discovered through investigation that the man did not have a gun, he simply had his paperwork rolled up under his jacket.

Under the new changes, the decision maker can decide that although Jessica genuinely believed it was a gun and the fear for her life was real, it was not reasonable for her to hold that belief as all she had to go by was an outline under a jacket.

Compensation Standards

Finally, the Bill allows Comcare to create "Compensation Standards" that will give Comcare the power to make legislative instruments that specify an ailment and set out "minimum factors" that must be found to exist "before it can be said that an employee is suffering from the ailment".[4]

This proposal allows Comcare to create further limiting criteria on certain injuries, without having to put the proposals through the normal course of legislative change and the democratic right of Parliamentary debate. Such a proposal grants broad powers to Comcare without the checks and balances of legislative oversight and should be closely scrutinised and ultimately opposed.

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DISQUALIFYING CRITERIA

Not only is the Bill making it harder to gain access to compensation, but is also making it much easier to disqualify claims.

The Bill proposes to exclude compensation for injuries suffered as a result of "reasonable management action"[5] which expressly includes any "direction given for an operational purpose or purposes"[6]. This is much broader than the current "reasonable administrative action" exclusion.

Not only is this proposal a complete rejection of Mr Hanks' recommendations, but his recommendations about what not to do were implemented, despite Mr Hanks clearly articulating his concerns about the matter.[7]

The proposed amendments referred to above are clearly cast from employers' dissatisfaction over the Full Federal Court decision of *Reeve.*[8] This case addressed the extent of the current "administrative action" exclusion, and held that the exclusion could not possibly have been intended to include "operational" action, such as an instruction to perform work at a particular location, to drive on a particular route, or to perform particular duties.[9]

The Court came to this conclusion because otherwise it would be difficult to see how "anyone would have an entitlement to workers' compensation". The Court gave the example of injury incurred to an employee in falling down stairs at his or her workplace being the result of administrative action in directing that employee to work at that workplace. If a truck driver became injured as a result of a motor vehicle collision, it could be asserted that the injury was the result of the administrative action in directing the driver to drive a particular route on that day.[10]

Nonetheless, the changes now propose to completely circumvent the dangers highlighted by the Full Court and make it far more difficult for anyone to receive compensation for accidents and injuries arising in the workplace.

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Case Example 3

Michael works as an Agent for the Australian Federal Police. As part of his duties, he was directed by his Superior Officer to investigate a suspected drug lab that was located in a residential home.

Michael goes to the location and sees the drug lab through the back window. He knocks on the front door and out jumps a stranger and stabs him in the chest multiple times, causing severe puncture wounds to his heart and lungs. He is put in a critical condition and is fighting for his life in hospital.

A compensation claim was lodged. However, under the new laws, the claim can be rejected because the injury resulted from the reasonable operational direction given by Michael's superior officer to investigate the suspected drug lab.

REHABILITATION

The repealing of s 37 of the SRC Act is unacceptable. It removes and minimises the important role that a worker's treating medical practitioner plays in the appropriate rehabilitation and return to work of an injured worker.

The introduction of the Workplace Rehabilitation Plan Framework strengthens the power of employers and removes important protections for injured workers.[11] These plans appear to contemplate an incredibly proscriptive range of obligations on employees and can direct injured workers to participate in interviews by phone, job seeking activities, advice or assistance about return to work.

It is not hard to envision the very real likelihood that workers will be approached by private rehabilitation providers and prematurely forced back into roles that further endanger the health of the employee, while securing payments by Government and self-insured licensees to private sector rehabilitation and employment companies. Employees have no adequate protections. The rights and business concerns of the employer are preferred and trump those of the injured worker, irrespective of the longitudinally valuable input of their own medical practitioner(s).

For example, the proposed section 36G allows an employer to vary or revoke a rehabilitation plan *at any stage*. There is no equivalent right for an employee. If a worker requires amendments or changes to the plan there is no avenue for redress

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under the proposed amendments. Instead they are under an obligation to notify their employer in writing within 3 business days if they are not in a position to comply with a rehabilitation plan.[12] This is an unrealistic expectation that places compliance with a rehabilitation plan above the needs of an injured worker. There is a real risk that some workers will be forced back to an employment situation before they are ready, without any reference being given to the opinions of experienced medical practitioners with longstanding involvement in the treatment and ongoing monitoring of the worker.

There is no adoption of the recommendations of Mr Hanks that strengthen obligations of employers. There is no development of an inspectorate to ensure compliance and standards of approved rehabilitation providers. There is no strengthening of the obligations of employers to provide suitable employment opportunities actually linked to real market and labour force opportunities. The changes to the rehabilitation framework of the Act are strongly opposed. They are not geared at genuinely facilitating a worker's return to work. Rather they remove important consultation and legislative review mechanisms for injured workers.

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Case Example 4

Judy is an Australian Postal Corporation employee. She injured her right shoulder at work due to repetitive lifting above shoulder height over many years. She has just put in a claim for compensation but cannot afford to pay for the MRI scan that her treating GP recommends. Australia Post has her assessed for rehabilitation prior to her claim being formally accepted.

A private injury rehabilitation provider is engaged and she is assessed by a Facility Nominated Doctor then provided with a very detailed Workplace Rehabilitation Plan. When drawing up the plan Australia Post rehabilitation provider tried to contact Judy's GP twice by phone but proceed to issue the plan anyway. The plan says that she can continue her current job but she is still required to do repetitive sorting activities, just for a lesser amount of time. Judy is a stoic worker and complies.

Judy sees her GP 4 weeks later once her claim is accepted. Her GP writes a medical certificate saying that the MRI scan reveals a supraspinatus tear in her right shoulder and refers her to an Orthopaedic specialist for assessment. Her GP believes that continuing to work after the initial injury has made the tear worse. The GP writes a medical certificate saying she is presently unable to do repetitive lifting of any kind.

Judy has not had her rehabilitation plan updated. She is technically in breach of the plan as she is unable to perform the duties specified. Notwithstanding her current medical certificates saying she is unfit for work she is still found to be in breach of the plan without reasonable excuse and s 29R is applied to argue the worker has breached an obligation of mutuality.

PERMANENT IMPAIRMENT

Currently, the Comcare scheme offers no meaningful access to Common Law. The purported "trade-off" when the Act was enacted was an entitlement to permanent impairment compensation (if workers meet a 10% threshold) and non-economic loss compensation.

Over time, Comcare have introduced Guidelines making it much harder to meet the 10% criteria. Currently only, severe injuries seem to meet the 10% threshold.

Now, the current Government want to restrict access even further. The Bill proposes the three following significant changes that will each, and in total, have a

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detrimental effect on workers' rights:

- Excludes all access to permanent entitlement for secondary psychological conditions;
- Removes an entitlement to Non-Economic Loss compensation;
- Introduces an algorithmic model for the assessment of Permanent Impairment.

It is disturbing that despite a rhetorical commitment to mental health issues, the current Government does not consider that psychiatric injuries can be just as disabling as physical injuries.

The exclusion of secondary psychological injuries serves the sole purpose of ensuring that workers who suffer psychological harm due to the significant physical impairments cannot receive permanent impairment entitlements. This is a significant reduction of the present rights of the injured.

Often it is the most severely injured workers that require this element of redress the most. The lack of any meaningful Common Law entitlements under the scheme makes permanent impairment entitlements the only avenue of receiving compensation for permanent functional damage caused to a worker.

There was no recommendation that such a change be made to the legislation by Mr Hanks. The amendment is introduced solely to limit the compensation payable by employers.

This proposition will disproportionally harm workers with the most significant and longstanding physical injuries who subsequently develop accepted secondary psychiatric injuries. It is a thinly veiled attack on the rights of injured workers.

Section 27 of the Act provides a second head for the calculation of permanent impairment entitlements, namely a person's non-economic loss. It provides a meaningful forum for workers to assess the effects of their injuries on their quality of life and activities of daily living.

Removing this section means that injured workers with a recognised permanent impairment of their entire person will not be able to receive compensation representing how their accepted work caused injury and impairment impacts on them in terms of pain, suffering, and impact on pre-injury social relationships, recreation and leisure activities. Again, this is a clear and significant reduction of the present rights of the injured aimed at limiting compensation payable by employers in a no-fault workers' compensation scheme.

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Case Example 5

Peter works for a large Australian engineering company. Over the course of working with this company, Peter was subjected to three separate accidents at work. As a result, he has injuries to his arm leg and neck. He is greatly restricted in his activities of daily living and the pain is severe, however none of the injuries meet the 10% threshold.

Peter cannot take the pain anymore, and decides to take his own life. He is unsuccessful, but is admitted to a psychiatric inpatient facility where he in monitored closely. His life is ruined. His family left him, has no job, and cannot enjoy the activities he used to anymore.

Despite being severely impaired psychiatrically, Peter has no access to compensation for the severe loss of quality of life.

Finally, the introduction of the algorithmic model is ill-advised and opposed. The application of an algorithmic model is highly deceptive. The 10% whole person permanent impairment threshold produces a result where many, if not the majority, of permanently injured workers receive no compensation for permanent impairment and non-economic loss. Of those workers who do presently qualify for permanent impairment and non-economic loss compensation, the vast majority of that cohort would be assessed in the 10-25% whole person impairment range.

The practical effect of the proposed shift to an algorithmic model for the calculation of dollar amounts is that a huge number of workers would be significantly worse off, with a small number of workers being moderately better compensated.

It is dishonest to identify the proposed shift towards the algorithmic model as something which would increase or promote fairness and equity in outcomes of injured employees. The existing linear model of calculating entitlements is preferred, and should be maintained, as it is a fairer means of awarding compensation under the SRC Act.

SANCTIONS

The Bill introduces a broad sanctions regime that penalises workers for failing to meet their employee obligations, including a total and permanent cancellation of much needed benefits if the decision maker believes that a worker has breached a series of “mutual obligations”.

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Any form of sanction scheme is in direct contrast to the objects and purposes and the beneficial intention of the SRC Act. The introduction of the sanction provisions is, quite simply, draconian. It erodes any meaningful concept of collaboration between injured employer and employee and instead introduces an ostensibly punitive framework to for force compliance on threat of removal of rights under the Act. It is hard to see how any such a proposal will meaningfully assist injured workers.

Failure to accept offer of suitable employment

The sanctions imposed in relation to suitable employment are highly inappropriate. If a worker fails to accept an offer of suitable employment without reasonable excuse then they are found to have breached an "obligation of mutuality." The definition of suitable employment has not been amended to accord with any actual market or labour force opportunity.[13] Instead reference is made simply to the *potential* of an employee to be in suitable employment.

This is even more broadly defined in the Bill to be ascertained by having regard to an employee's potential to be rehabilitated, potential to benefit from medical treatment and other relevant matters. Under this proposal workers are at risk of having any "offer" of employment presented and being effectively compelled to take it or risk being found in breach of their obligations. This proposal interferes grossly with an individual's rights to choose their occupation and employer. Furthermore, existing deemed ability to earn provisions under the SRC Act are already a sufficient inducement to encourage workers to actively seek, accepts and engage with a real employment opportunity.

Employee that does not follow medical treatment advice

S 29P of the Bill proposes to apply a sanction where a worker does not follow reasonable medical advice. This a broad encroachment on the rights of an individual to choose their own treatment course in relation to their health. It circumvents the doctor-patient relationship entirely and grants untenable powers to private licensees and Comcare to ostensibly dictate the medical treatment that should occur.

Furthermore, "medical practitioner" is not appropriated defined and it is conceivable under the current proposed framework that a medico-legal specialist, who write reports solely for insurance purposes, may make recommendations in relation to the clinical treatment of an injured worker. This is totally inconsistent with current workers' compensation insurance practice in States and Territories and is unacceptable. The medical history, trust and clinical importance of a longstanding treating doctor-patient relationship can potentially be usurped.

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Whilst some limited caveats are applied such that the sanction does not apply to operations or medication any imposition of such a sanction is out of step with well-established community values and expectations.

RIGHTS TO OBTAIN INFORMATION FROM MEDICAL PRACTITIONERS

The Bill's proposal to compel workers to provide all medical information from treating medical providers is highly inappropriate. No other workers' compensation scheme provides for such a broad and unrestrictive provision of private medical information. The private rights of individuals to consultation and treatment are being eroded by these provisions without justification. Workers may be obliged to disclose highly confidential and sensitive information irrelevant to the workers compensation issues in dispute. That information can be used for a variety of purposes to the detriment of the injured worker without adequate protection checks and balances.

S 58, 58A, 120A and 120B all represent changes that now enable Comcare and licensees to force an injured worker or claimants to obtain their doctor's private clinical notes. A worker must obtain "relevant information" or risk draconian sanctions being applied which, in this case, extends to a refusal to deal with a claim.

These changes represent an erosion of the doctor-patient relationship of confidentiality. Such provision of confidential medical information currently only occurs in the context of legal proceedings where adequate protections exist to ensure that clinical information is only used for the Administrative Appeals Tribunal proceedings alone.

Workers have the right to redact or refuse to disclose other private and confidential information that they do not wish to share with their employer. In the context of Administrative Appeals Tribunal proceedings this can be done with the assistance of experienced legal practitioners. The new provisions have no such protections. The privacy of the doctor-patient relationship is entirely disregarded. Information obtained can conceivably be used for all manner of claims administration be it current or future claims. Such a proposal is deeply concerning and attacks the fundamental rights of individuals to engage in meaningful and confidential consultations with their medical practitioners.

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LEGAL COSTS

Opposition to Schedule of Legal Costs

The ALA strongly opposes the establishment of a Schedule of Legal Costs as per the proposed s67A, which limits the amount of legal costs a worker can recover in being made to fight to overturn a decision of Comcare or the licensees that was wrong.

Decision-makers (i.e. the Commonwealth and self-insured licensees) in the Comcare scheme are routinely represented by lawyers with decades of experience. The proposed Schedule of Costs, however, in no way limits the amount of money able to be spent by Government or big business in engaging these specialist solicitors.

Our expectation is that presently there is far more being spent on lawyers in AAT Applications by employers and insurers in the scheme than there is on that portion of legal costs reimbursed to injured workers who are successful in the AAT. It is not appropriate to limit individual workers' costs recovery in such circumstances and the ALA does not support the proposed s67A.

The stated intention of the proposed Schedule of Costs is to avoid long drawn out proceedings. The ALA states that a Schedule of Costs will not achieve this outcome, but will rather see the opposite effect.

Having a cap on legal costs will result in workers not being able to obtain legal representation with the requisite level of expertise as Comcare's lawyers. Having adequate legal representation assists workers in understanding the risks, prospects and knowledge of meaningful resolution that are not obvious to a lay person. The absence of this advice will result in workers simply running matters straight to hearing, which is what largely happens in the Social Security jurisdiction, where legal representation is severely limited.

The ALA supports the reimbursement of an injured worker's pre-Administrative Appeals Tribunal costs as per the proposed s62A. Our members' experience is that valuable factual and medico-legal investigation presently takes places in the course of an AAT Application, being work done by or on behalf of a worker by legal professionals. This work enables scheme decision-makers (and if necessary, the AAT at hearing) to arrive at a correct or preferable decision accepting or denying a worker's claim.

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CONCLUSION

Draft legislation is often as remarkable for what it does not address, as for what it proposes to address.

In respect of the latter, it is clear that the purported improvement of the Comcare scheme is almost universally an attack on injured workers and their families. The draft bill is the culmination of a wish-list of "reforms" elicited from big business and it seeks to transform a bad scheme into something far worse. The proposed changes are ideologically-driven and will, if enacted, fundamentally alter the manner in which Commonwealth compensation claims are determined and adjudicated.

In respect of the former, the Bill, as with the other two Bills aimed at expanding and protecting Comcare, is silent on the safety vacuum created by Comcare, including the its diminished capacity for enforcing workplace health and safety compliance in high risk industries. Comcare is recognised as a terrible performer on safety oversight, enforcement and prosecution compared to the states and territories. In combination with the attempt to end the competition test, if enacted, expanded Comcare will be a direct contributor to greater numbers of workplace deaths and injuries in Australia.

In any consideration of scheme reform, those proposing the reform should be clearly prepared to identify not only the winners (and with these reforms, it is hard to see any, except big business operating in more than one state) and the losers. With these proposed changes, the losers are injured workers and their families. The government should be prepared to clearly set out in dollar terms the full nature and extent of the benefits being stripped from injured workers. The number of claims being cut out should be identified and the government should explain and defend just why those being stripped of compensation are now deemed unworthy of support.

Furthermore, it would be remiss of any inquiry considering this proposed legislation to not also consider the ramifications of the Bill on the Federal Budget bottom line. As stated throughout this submission, the proposed legislation and its related Bill seek to fundamentally water down workers' compensation rights, and move workers out of well-balanced workers' compensation schemes. Such efforts are extremely short-sighted. Not only will these moves provide only minimal benefits for short periods, they will also see many people being forced to pursue social security and Medicare benefits, when currently they have fairer worker's compensation schemes covering their losses. The proposed legislation will lead to the financial burden being transferred from State and Territory workers' compensation schemes administered according to insurance principles and practices, to Commonwealth

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social security and Medicare services, something that any Government seeking to curtail Budget expenditure would surely be looking to avoid.

REFERENCES

[1] Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>
[2] Clause 5A(2)
[3] *Comcare v Mooi* 1996 (FCA) 1587
[4] Cl 5B(3); cl 7A
[5] Cl 5A(2)
[6] Cl 5A(2)(h)
[7] Para 5.123 Hanks review
[8] *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21
[9] *Reeve* at para [31].
[10] *Reeve* at par [24]
[11] S 26A and s 36B
[12] Cl 36M
[13] Cl 29L

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