

CHAPTER 1

Background

Reference

1.1 On 5 July 2011, the Senate referred the provisions of the Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011 to the Senate Standing Legislation Committee on Education, Employment and Workplace Relations for inquiry and report by 15 September 2011.

1.2 The Bill was introduced into Parliament by Mr Adam Bandt MP on 4 July 2011 and co-sponsored by Ms Maria Vamvakinou MP and Mr Russell Broadbent MP.

Conduct of the inquiry and submissions

1.3 The committee advertised the inquiry in *The Australian* on 20 July 2011, calling for submissions by 29 July 2011. Details of the inquiry were placed on the committee website.

1.4 The committee contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 27 individuals and organisations, as listed in Appendix 1.

1.5 Public hearings were held in Melbourne on 9 August, Canberra on 23 August and Perth on 2 September 2011. Witness lists for the hearing are at Appendix 2.

1.6 The committee also conducted a number of site visits in Melbourne, Geelong and Brisbane.

Acknowledgement

1.7 The committee thanks those individuals and organisations who made written submissions and gave evidence at the committee's hearings.

1.8 The committee particularly wishes to extend its appreciation to the firefighters, and families of firefighters, who made submissions and those who travelled to relate their personal experiences to the committee at its hearings. These individuals invested valuable time and effort knowing that they personally did not stand to benefit from the provisions of this Bill. Their evidence was both important and extremely moving. The committee thanks them and recognises their efforts to help current and future generations of firefighters.

1.9 The committee is grateful to the United Firefighters Union of Australia for facilitating a series of site visits over the course of this inquiry, which have given the committee valuable exposure to the functions, duties and responsibilities of firefighters. The committee greatly appreciates the time and cooperation it has

received staff at from Aviation Rescue and Fire Fighting (ARFF), a division of Air Services Australia (Tullamarine Station), the Country Fire Authority (CFA) in Geelong, the Queensland Fire and Rescue Service (QFRS) and the Queensland Combined Emergency Services Academy (QCESA) at Whyte Island.

1.10 The committee also extends a particular note of gratitude to Mr Alex Forrest and Fire Chief Ken Block, who travelled from Canada to share with the committee their valuable and extensive experience with presumptive legislation overseas.

Background

1.11 For several decades scientific studies have shown that firefighters are at increased risk of developing certain types of cancer. This is due to ongoing exposure to carcinogenic particles released by combusting materials of varying toxicity, which firefighters routinely encounter during the normal course of their employment:

Firefighters are by the nature of their work exposed to a large range of chemical carcinogens. Although most chemicals have not been tested for their toxic effects there are a number of chemicals that arise as the products of combustion that have been shown to be carcinogenic.¹

1.12 Studies have been conducted across a number of countries, and have in recent years been bolstered by comprehensive meta-analyses which provide strong evidence that firefighters are at increased risk of certain types of cancer through accumulated exposure to carcinogens.

1.13 These studies are discussed further in Chapter 2 of this report, which explores the science that underpins the proposed legislation.

Purpose of the Bill

1.14 The Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011 (the Bill) seeks to amend provisions in the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) relating to injuries sustained by firefighters.

1.15 The Bill would provide for a rebuttable presumption that the following cancers developed by qualifying firefighters will be presumed to be work related under Commonwealth law. Subject to qualifying periods set out in the Bill as outlined below, the burden of proof would be removed from the cancer sufferer.

1.16 The seven primary site cancer types covered by the Bill and the respective qualifying periods are:

1. Brain cancer (5 years);

1 Michael Smith, Deputy Chief Officer, South Australian Metropolitan Fire Service, *Attachment, Submission 13*, p. 35.

2. Bladder cancer (15 Years);
3. Kidney cancer (15 years);
4. Non-Hodgkin's lymphoma (15 years);
5. Leukaemia (5 years);
6. Breast cancer (10 years); and
7. Testicular cancer (10 years).

1.17 The committee received the following definition of a presumption in law:

A presumption in law is a rule of law which permits a court to assume a fact is true until such time as there is a preponderance (greater weight) of evidence which disproves or outweighs (rebutts) the presumption. Each presumption is based upon a particular set of apparent facts paired with established laws, logic, reasoning or individual rights. A presumption is rebuttable in that it can be refuted by factual evidence. One can present facts to persuade the judge that the presumption is not true.²

1.18 To qualify, firefighters would need to meet the following threshold tests:

- They must suffer from a prescribed illness;
- They must have been employed as a firefighter for the applicable qualifying period; and
- They must have been exposed to the 'hazards of fire' during the qualifying period.³

1.19 In effect, the establishment of this legal presumption would facilitate access to workers' compensation for firefighters who fit the qualifying criteria by shifting the burden of proof from the firefighter to the employer or insurance company seeking to dispute the occupational linkage between a firefighter's cancer and his or her employment duties.

1.20 However, even when the above threshold criteria are met, the presumption that the cancer in question is related to employment would remain rebuttable. The nature of the rebuttable presumption would mean that a firefighter's claim for compensation would remain '...subject to any legal defences otherwise available.'⁴

1.21 This means that acceptance of occupational causation is not automatic:

[I]t does not mean that the employee's claim will automatically be accepted. The employer may provide evidence to show that the disease is due to some other factor that is not employment related and, if that evidence is sufficiently strong, it may rebut the presumption that the disease is

2 Department of Education, Employment and Workplace Relations, *Submission 25*, p. 7.

3 See Schedule 1, Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011.

4 Slater & Gordon Lawyers, *Submission 14*, p. 3.

employment related. As in all claims, the decision maker has to be satisfied, on the balance of probabilities, that the disease is due to the person's employment. Nevertheless, in the case of the proposed subclause 7(8), the decision maker will be starting with the presumption that, if the condition is a listed disease, and all the other factors are met, then the disease is compensable.⁵

1.22 This would protect employers and insurance bodies, and ensure the policy response is appropriately based on scientifically demonstrable evidence.

1.23 This differs from non-rebuttable presumptive legislation insofar as the latter is based on consistent epidemiological evidence that an illness is linked to a particular cause associated with the workplace or work process in almost every case, as in the case of mesothelioma resulting from asbestos exposure.⁶

Coverage

1.24 The SRC Act has limited coverage:

Each state and territory has its own workers compensation legislation. Coverage of the SRC Act is limited to Commonwealth employees, ACT Government employees and the employees of licensed entities. As a result, coverage of the SRC Act is limited to only a relatively small proportion of the Australian workforce.⁷

1.25 The proposed Bill would therefore cover only employees classified as firefighters under the SRC Act.

1.26 There are currently approximately 2800 firefighters covered by the Act. Of these, around 2000 are employed by the Australian Capital Territory (ACT) Government. Some 1500 of these are volunteer firefighters who would not qualify for coverage by the Bill. Most of the others are firefighters employed by the aviation industry nationwide:⁸

Based on ABS Labour Force Statistics (November 2010), it is estimated that employed firefighters covered by the SRC Act represent approximately eight per cent of the Australian firefighting labour force. The remainder

5 Department of Education, Employment and Workplace Relations, *Submission 25*, p. 7.

6 See Mario Racco, Parliamentary Assistant to the Minister of Labour, Canada, 'Report to Minister Peters on the treatment of Firefighter Cancer Claims by the Workplace Safety and Insurance Board,' Ontario Ministry of Labour. Available at <http://www.labour.gov.on.ca/english/hs/pubs/firefighters/review.php> (accessed 15 August 2011).

7 Department of Education, Employment and Workplace Relations, *Submission 25*, p. 4.

8 Department of Education, Employment and Workplace Relations, *Submission 25*, p. 6.

would be covered under state and territory legislation for workers' compensation.⁹

1.27 Ultimately, the Bill would cover:

- Professional firefighters in the ACT (approximately 332); and
- Firefighters employed by Aviation Services throughout Australia (approximately 663).¹⁰

1.28 Similar presumptive legislation is already in place in much of Canada and the United States, countries which are in many ways analogous to Australia, and is being considered in parts of Europe.

Presumptive legislation overseas

1.29 The majority of jurisdictions in Canada and the United States have enacted comparable presumptive legislation.

1.30 The Canadian province of Manitoba was the first to introduce presumptive legislation of this kind in 2002, following a report on the scientific links between cancer and firefighting commissioned by the province.¹¹ Being the first jurisdiction to take this step, Manitoba's initial legislation was cautious in nature, covering only five cancers: brain, bladder, kidney, non-Hodgkin's lymphoma and leukaemia.

1.31 Since then, nine of the thirteen Canadian jurisdictions have passed presumptive legislation recognising the link between certain types of cancer and firefighting.¹²

1.32 Manitoba itself today covers fourteen cancers, with the scope of the legislation expanded following further research linking a greater number of cancers with firefighting as an occupation.¹³ The committee was advised that the few remaining Canadian provinces which do not currently have similar presumptive legislation in place are either in the process of implementing it or considering doing so:

We have 10 provinces and three territories. Right now seven provinces have it, two provinces are in the process of putting legislation or regulations forward and in one province two days after I get back to Canada I will be

9 Department of Education, Employment and Workplace Relations, *Submission 25*, p. 6.

10 United Firefighters Union of Australia, *Submission 19*, p. 11.

11 The report by Dr Tee Guidotti is discussed by Mr Alex Forrest, *Submission 1*, p. 14.

12 For discussion see Mr Alex Forrest, *Submission 1*, p. 6 and *Proof Committee Hansard*, 2 September, pp 4–6.

13 Canadian jurisdictions today list 14 cancers in their presumptive legislation. For discussion see *Proof Committee Hansard*, 2 September 2011, pp 5–6.

meeting with the premier of that province and I believe that province will enact the legislation before the end of the year. Even within our territories two of the three have just passed legislation. The template right now is the 14 cancers that were initially put forward in Manitoba and have now been replicated in Alberta. So now there are 14 cancers and I can tell you that every single province is now looking at moving to the 14 cancers, largely because of the Le Masters study of 2007.¹⁴

1.33 In the United States presumptive legislation is in place in roughly half of the state jurisdictions, with more pending. The legislation is far from uniform, varying between states in the cancers covered, qualifying periods and other requirements necessary for firefighters to fulfil the criteria for compensation.¹⁵

1.34 Canada and the United States have responded to science and moved away from the system currently in place in Australia. Here, the onus is on firefighters with cancer to pinpoint a single event, or fire, which caused their illness if they seek to obtain compensation for their illness. For reasons to be discussed later in this report this requirement is very difficult to satisfy and has to date served as an almost insurmountable obstacle to firefighters seeking compensation. In many cases this has left sick firefighters and their families struggling not only physically and emotionally, but also financially, at their time of greatest need. It has meant that firefighters who put their health and lives at risk to help the community are let down when they themselves are in need of assistance.

Provisions of the Bill

1.35 Schedule 1 of the Bill inserts provisions into the SRC Act relating to cancers developed by firefighters.

Subsection 7(8)

1.36 A new subsection 7(8) would be added to Part 1 of the SRC Act, providing that firefighters diagnosed with one of seven primary site cancers after a set number of years of employment will have their employment taken to have been the dominant cause of the cancer, unless the contrary is established. Cancers listed in the Bill will not be covered if they are found to be secondary, that is, if they originated in and spread from other parts of the body.

1.37 Subsection 7(8)(a) confines the presumption of occupational illness to cancers identified in the paragraph 1.16. This ensures that 'only the clearest examples of occupational disease can seek to access the presumptive gateway.'¹⁶

14 Mr Alex Forrest, *Proof Committee Hansard*, 2 September 2011, p. 6.

15 Department of Education, Employment and Workplace Relations, *Submission 25*, p. 8.

16 Slater & Gordon Lawyers, *Submission 14*, p. 4.

1.38 The inclusion of the qualifying period in provisional subsection 7(8)(b) reflects that:

...broadly considered, the evidence of work relatedness of disease strengthens as the duration of potential occupational exposure increases...

As an alternative, the medical evidence as to the latency periods for the prescribed diseases from occupational exposure could equally have operated as part of the rebuttal process. That is, claims could have been contested on the basis of insufficient latency to support a work contribution. The approach adopted ought properly be viewed as a concession to finding an approach to the operation of presumptive legislation that takes into account the natural fears that scheme administrators might hold from time to time.¹⁷

1.39 Subsection 7(8)(c) makes reference to the 'hazards of fire'. Slater and Gordon Lawyers informed the committee that this was '...an important statement of principle going to the heart of the subject matter of the Bill – that the hazards of a fire scene are both pervasive and insidious.'¹⁸ This recognises that the hazards of fire may be transported away from the fire scene by firefighters and the equipment they carry:

The one complicating factor is that when we talk about the hazards of a fire scene that immediately invokes images of attending the fire itself or the immediate aftermath, but the thing with the cancers and the chemicals that firefighters are exposed to in this context is that quite often the hazard can migrate. It might not be the primary exposure at the site; it might be that the hazard is also experienced when cleaning fire equipment or cleaning out the truck back at the station if those chemicals have imposed themselves upon the clothing or the apparatus of a firefighter or on the truck itself. I understand that there is clearly a distinction between a clerical officer working for the department and the firefighter in confronting the hazards of the scene, but I think that we ought not to limit the concept of 'exposure to the hazards of a fire scene' to the immediate emergency because these things have a tendency to migrate away from the scene.¹⁹

1.40 The committee heard that the proposed legislation draws a line around firefighters and those engaged in firefighting activities. Coverage would not expend to other officers—such as mechanics or clerical officers—employed by the fire services:

The duties of the clerical officer who is running the accounts back at the station do not involve firefighting as a substantial portion of their role; therefore, I do not believe they would fall within the confines of the proposed amendment. I guess the point that I was making was more that a recognised firefighter may have had exposure beyond just at the primary scene, but I think those who are not employed to undertake firefighting

17 Slater & Gordon Lawyers, *Submission 14*, p. 4.

18 Slater & Gordon Lawyers, *Submission 14*, p. 5.

19 Mr Craig Sidebottom, Slater and Gordon Lawyers, *Proof Committee Hansard*, 2 September 2011, p. 16.

duties will not benefit, so I do not believe it is going to open the floodgates, as it were, to a vast array of claims from perhaps unintended beneficiaries.²⁰

Subsection 7(9)

1.41 A new subsection 7(9) would also be added to Part 1 of the SRC Act. This subsection would stipulate that workers must have been involved in firefighting duties as a substantial portion of their employment in order for subsection 7(8) to apply. Subsection 7(9) also allows firefighters who were employed over several separate periods which add up to the qualifying period to be taken to have been employed for the qualifying period.

1.42 The committee also notes that item 8 listed in the Bill would provide that other cancers prescribed in the future would also be governed by the provisions established by this Bill.²¹

1.43 These qualifying periods are a conservative but certain benchmark for the latency periods for various cancers. The committee understands that not all firefighters who develop cancer will be captured by the legislation due to these qualifying requirements. They are, however, necessary in order to create a culture of acceptance and certainty for firefighters, employers and insurers.²²

20 Mr Craig Sidebottom, Slater and Gordon Lawyers, *Proof Committee Hansard*, 2 September 2011, p. 16.

21 Slater & Gordon Lawyers, *Submission 14*, p. 4.

22 For more on qualifying periods see *Proof Committee Hansard*, 2 September 2011, pp 8–9.