

CHAPTER 3

Key issues

Burden of proof

3.1 Firefighters who are killed or injured attending a fire incident are given compensation for work-related injuries. However, firefighters who develop cancer and believe their illness to be work-related currently face substantial obstacles to seeking compensation.

3.2 The committee was informed that, at present, any attempt to obtain compensation requires firefighters to undertake adversarial, costly and often protracted legal proceedings to establish:

- a) The link between firefighting and cancer; and
- b) Causation between a *specific* fire incident and their illness.

3.3 The United Firefighters Union of Australia (UFUA) informed the committee that medical practitioners generally advise firefighters with cancer to minimise stress and focus on their cancer treatment.¹ Many firefighters, as the committee heard from personal accounts relayed in the next chapter, fund their own leave from work and even their treatment. Their families cannot access compensation in the event that they die.²

3.4 As a result, the emotional and financial costs of litigation involved mean that not many firefighters who develop cancer seek to access any entitlement or compensation:

These transactional costs and the potential stress and delay often act as a disincentive for firefighters with cancer to pursue their proper entitlements. I myself have seen firsthand several firefighters with potential claims discouraged from pursuing those claims for these reasons. Often the shock and trauma of a cancer diagnosis and subsequent treatment places a great strain on those affected and their families. The threat of litigation is often overwhelming and the need to focus on treatment and improving health is often paramount. In this way, the scheme can sometimes be as confronting as the injury.

The introduction of presumptive legislation will therefore lead to greater transactional efficiency. It will remove some of the emotional and financial

1 United Firefighters Union of Australia, *Submission 19*, p. 8.

2 United Firefighters Union of Australia, *Submission 19*, p. 8.

hurdles facing workers at the most vulnerable times in their lives. This in turn will improve client satisfaction with the scheme and hopefully drive down litigation costs.³

3.5 Those who would pursue compensation face considerable litigation costs. Representatives from Slater and Gordon Lawyers informed the committee that presumptive legislation in other jurisdictions often results in a reduction in litigation:

The presence of the rebuttable presumption means that it is open to insurers to still defend those claims where the cause of the cancer may be in question. However, I have certainly seen it in the proclaimed diseases provisions within the Accident Compensation Act in Victoria, where it does create more of a culture of acceptance of the claim rather than disputation. To give you an example, it might be the occurrence of Q fever amongst abattoir workers. Rather than having a protracted legal argument as to whether that disease has been caused by that type of employment, I have noticed that where that has occurred here it has been more readily accepted. That is to be applauded. It means that we are putting the resources into the appropriate places; they are not going to be expended on litigation. In litigation it is not only the cost; it is the emotional toll too. For workers who are quite ill and who quite often have a battle for their lives, the emotional toll of going to see doctor upon doctor for independent opinion or going to see a lawyer or going to court to give evidence can be quite stressful. Those people are, I guess, discouraged from pursuing that and sometimes will relinquish what their proper entitlement might otherwise be. So when we speak of these amendments not creating a new entitlement, it does not, but it does make it more efficient and more readily available for those who perhaps are most deserving of our support.⁴

The SRC Act

3.6 The Safety, Rehabilitation and Compensation Act (the SRC Act) sets up the framework for workers' compensation and rehabilitation for the Government's Comcare⁵ scheme. The Department of Education, Employment and Workplace Relations provided the following on the Act:

It establishes a fully funded premium based system and a licensed self-insurance based system of compensation and rehabilitation for employees who are injured in the course of their employment. The scheme covers approximately 211,000 Australian and ACT government employees and approximately 163,000 employees of self-insured licensees (as of 30 June 2010).

It provides a comprehensive benefit structure that includes:

3 Mr Craig Sidebottom, Slater and Gordon Lawyers, *Proof Committee Hansard*, 2 September 2011, p. 15.

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

5 For more on Comcare see: <http://www.comcare.gov.au/> (accessed 29 August 2011).

- the payment of the reasonable cost of medical treatment;
- income replacement for periods of incapacity for work;
- payment of a lump sum for permanent impairment; and
- payment for rehabilitation programs.

In general, access to benefits under the SRC Act depends upon whether or not the injury, illness or disease can be demonstrated, on the balance of probabilities, to be work related.⁶

3.7 'Disease' is defined by the SRC Act as an ailment suffered by an employee that was contributed to by employment:

The way that scheme works is that there is an ILO [International Labour Organisation] list of occupational diseases. There is an expert panel that assesses exposure and likelihood of causation. Once a disease is on that list, under the provisions of the act as it applies, if—to take a hypothetical—one of our firefighters were to acquire a disease to which these deeming provisions apply, then that would bring into effect the workers compensation arrangements under the act.⁷

The ILO list of occupational diseases

3.8 All Australian jurisdictions except Queensland already include in their respective workers' compensation legislation lists of biological agents and chemicals with known links to certain diseases. These, including those listed under the SRC Act, are all based on the International Labour Organisation's (ILO) List of Occupational Diseases.⁸

3.9 The ILO list was created following the Workmen's Compensation (Occupational Diseases) Convention (Revised) 1934. Australia ratified this convention in 1959. The diseases included in the ILO's list adhere to set criteria:

- (i) there is a causal relationship with a specific agent, exposure or work process;
- (ii) they occur in connection with the work environment and/or in specific occupations;
- (iii) they occur among groups of persons concerned with a frequency which exceeds the average incidence within the rest of the population; and
- (iv) there is scientific evidence of a clearly defined pattern of disease following exposure and plausibility of cause.⁹

6 Department of Education, Employment and Workplace Relations, *Submission 25*, pp 4–5.

7 Mr Andrew Kefford, Deputy Director-General, Chief Minister and Cabinet Directorate, *Proof Committee Hansard*, 23 August 2011, p. 2.

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

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

3.10 Although most Australian jurisdictions list some of the toxins cited by the ILO's list, not all have updated their respective lists of deemed diseases to reflect reviews and updates made by the ILO.¹⁰

3.11 Furthermore, the committee heard that the list of deemed diseases in the SRC Act, which is based on the ILO list, does not in fact include all the cancers listed by the proposed Bill:

Advice from Comcare is that their preliminary research—noting that that research has not been conducted through a medical or scientific expert—indicates that the existing list of declared diseases that can be caused by exposure to relevant toxins would encompass certain cancers but may not encompass all cancers listed in the firefighters bill. Comcare have further advised that this would continue to be the case even if the current list of declared diseases and toxins under the SRC Act is updated to bring it into line with the current ILO list of occupational diseases.¹¹

Subsection 7(1) of the SRC Act

3.12 Subsection 7(1) of the Act provides that:

Where:

- (a) an employee has suffered, or is suffering, from a disease or the death of an employee results from a disease;
- (b) the disease is of a kind specified by the Minister, by legislative instrument, as a disease related to employment of a kind specified in the instrument; and
- (c) the employee was, at any time before symptoms of the disease first became apparent, engaged by the Commonwealth or a licensed corporation in employment of that kind;

the employment in which the employee was so engaged shall, for the purposes of this Act, be taken to have contributed, to a significant degree, to the contraction of the disease, unless the contrary is established.¹²

3.13 That is, arguably the SRC Act already '...makes specific provision for what is intended by this Bill.'¹³ It provides presumptions for certain prescribed occupational diseases, although, as seen in paragraph 3.11, not for all the cancers listed by this Bill.

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

11 Ms Michelle Baxter, General Manager, Workplace Relations Implementation and Safety Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 23 August 2011, p. 9. For the ILO list of occupational diseases see: http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_150323/lang--en/index.htm (accessed 12 September 2011).

12 Subsection 7(1), *Safety, Rehabilitation and Compensation Act 1988*.

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

3.14 It does so by enabling:

...the Minister to specify certain diseases are related to employment of a specific kind, unless the contrary can be proved. This presumes that certain diseases (specified by the Minister), that are contracted by an employee in a specific kind of employment, are related to that employment.¹⁴

3.15 The ACT Government argued that the above subsection of the SRC Act already provides adequate coverage for ACT firefighters. Mr Andrew Kefford, Deputy Director-General in the ACT's Chief Minister and Cabinet Directorate stated:

...all of those firefighters we have mentioned are covered in the course of their duties by the act to which this bill relates. We note in that context that that act provides a reverse onus of proof where a worker—and they are all classified as workers for this purpose—contracts a disease that is specified under the act. The act provides for compensation for all territory workers where diseases associated with particular toxin exposure in their employment on the balance of probabilities involved exposure to such toxins. This means in practice that, if a firefighter contracts cancer and that disease is linked to exposure to toxins during their employment, then it would more than likely be taken to be a compensable injury, although I note for the information of the committee that to the best we have been able to ascertain from the history there has not been a claim for occupational cancer amongst the territory's firefighters.¹⁵

3.16 Mr Kefford added that records of incident notifications kept by the ACT's fire services would help ACT firefighters obtain compensation:

If we were in the situation of someone who had been a firefighter in the ACT contracting cancer then part of the process that applies at the moment is that they would need to show that they had been a firefighter and exposed in the course of their work. There would be records that would permit them to do that.¹⁶

3.17 The records in question refer to the Australian Incident Reporting System (AIRS). The committee heard that AIRS data, however, is used to measure emergency response effectiveness and is not designed to collect information which could be reliably used in compensation claims:

AIRS is a mechanism for fire services to collect data as to the incidence of fire and is used to identify trends in fires and incidents. It is not a system designed to record the event from the firefighter's perspective, experience or exposure to toxins.¹⁷

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

15 Mr Andrew Kefford, Deputy Director-General, Chief Minister and Cabinet Directorate, *Proof Committee Hansard*, 23 August 2011, pp 1–2.

16 Mr Andrew Kefford, Deputy Director-General, Chief Minister and Cabinet Directorate, *Proof Committee Hansard*, 23 August 2011, p. 5.

17 United Firefighters Union of Australia, *Supplementary submission 19*, p. 6.

3.18 UFUA provided the committee with an excerpt from the Australasian Fire and Emergency Service Authorities Council (AFAC) website, which acknowledges the limitations of AIRS:

Some anomalies in the data exist due to separate development of the reporting systems by each fire service. It is not required that AIRS reports be supported by irrefutable evidence.¹⁸

3.19 UFUA expanded on the limitations of the AIRS system, citing the following drawbacks:

- The system does not record firefighters' exposure to toxins as a result of combustion at the fire scene;
- The exposure recorded refers to exposure from the fire scene—for example from spread to another structure—not exposure to the firefighter;
- The use of breathing apparatus and specialist protective equipment is recorded as the number of sets used without details about which firefighter used the equipment;
- The recording of respiratory protection and protective equipment is not compulsory for structure fires;
- It is not mandatory to fill each field in the system; this may mean that important information is at times omitted;
- The recorded data relies on what is visible to the officer at the scene; and
- Due to the short timeframes firefighters operate in, officers do not have adequate time to record precisely which toxins or carcinogens are present in the environment.¹⁹

3.20 Therefore the records available do not appear sufficiently reliable to form the basis of solid compensation claims.

Does the SRC Act provide adequate cover?

3.21 The ACT Government's evidence that any ACT firefighters who wish to make a claim can already do so under subsection 7(1) of the SRC Act reaffirmed the position expressed by the ACT Government earlier in its submission:

The SRC Act already provides presumptions for prescribed occupational diseases.²⁰

18 Quoted in United Firefighters Union of Australia, *Supplementary submission 19*, p. 6.

19 For more detail on AIRS see appendices to United Firefighters Union of Australia, *Supplementary submission 19*.

3.22 However, the same part of the above submission goes on to explain:

That is, the disease is deemed to be work-related if the worker's employment involved exposure to certain chemicals, toxins and biological agents.²¹

3.23 This means that ACT firefighters who develop cancer may technically seek and obtain compensation under the SRC Act as it stands. Importantly however, they still have to prove on the balance of probabilities:

- (i) That the disease (cancer) was caused by the exposure to the particular chemical or toxic compound; and
- (ii) That the employee was exposed to that particular chemical or toxic compound.²²

3.24 Mr Steve Kibble of Comcare outlined for the committee the tests and process involved in determining claims under subsection 7(1) of the SRC Act as it stands:

When we determine claims under that subsection there are two evidentiary tests considered. The first one is disease of a kind—and I am referring to the legislation—and the second is employment of a kind, which involves exposure to a specified risk. For example, the notice of the deemed diseases provides coverage for occupational diseases caused by benzene, for those employees whose employment involves exposure to benzene.

With that example, firstly, it must be established that the disease is of a kind caused by benzene and the person who is making a decision about the claim would rely on specialist medical evidence or research that provides a scientific and medical link to the contraction of a kind of disease caused by benzene. Secondly, the delegate would rely upon the information provided on the claim form or obtain factual evidence from the employer and/or the employee to establish that the employee was engaged in a kind of employment involving exposure to the risk—that is, of benzene—before they contracted the disease and their employment involved exposure to the risk. For example, if a firefighter fought structural fires, therefore it can be taken that he or she had been exposed to benzene.²³

3.25 However UFUA reminded the committee that:

Firefighters cannot prove 'exposure' to the particular chemicals or toxins at the specific fires or incidents they have attended. It is simply not possible or practicable for the detection of the numerous toxins firefighters are exposed to at each particular fire. This problem is exacerbated as the exposure can be over a long period of time at a number of fires/incidents and the cancers have various latency periods.

20 ACT Government, Chief Minister and Cabinet, *Submission 24*, p. 2.

21 ACT Government, Chief Minister and Cabinet, *Submission 24*, p. 2.

22 United Firefighters Union of Australia, *Supplementary submission 19*, p. 4.

23 Mr Steve Kibble, Comcare, *Proof Committee Hansard*, 23 August 2011, p. 10.

Therefore, without being able to prove that exposure at any particular time in the employment, the firefighter fails to meet the test for the presumptive threshold as specified in section 7(1) [of the SRC Act]. The firefighter is left in the impossible position of having to prove the link of the cancer with their particular work as a firefighter.²⁴

3.26 Asked how a firefighter could prove exposure under subsection 7(1) of the SRC Act as it stands, representatives of the ACT Government stated the following:

If we were in the situation of someone who had been a firefighter in the ACT contracting cancer then part of the process that applies at the moment is that they would need to show that they had been a firefighter and exposed in the course of their work. There would be records that would permit them to do that. I might come back to what you were saying before about knowledge of the provisions. I should say that safety generally and workers' safety generally in our fire services are things that are at the front of the government's mind. They are at the front of the minds of all of the people involved in it. So I am confident that any firefighter who contracted a disease or work injury that even might have been related to their work would know about the appropriate channels through which they should go to pursue their claim, whether they be a member of our ESA or a volunteer brigade.²⁵

3.27 The onus, therefore, would still be on the sick firefighter to prove occupational exposure to carcinogens. In fact, given that cancer results from cumulative exposure, firefighters seeking compensation could be required to provide a trail of evidence on exposure going back a decade or more.

3.28 This, the committee understands, would be achievable only if, after every fire event, authorities conducted a thorough scientific analysis of chemicals present in the fire, and then provide each firefighter involved in the response with a detailed list of chemicals they were exposed to. The administrative burden and cost of such an endeavour would be prohibitive. Easing the extremely difficult task of proving the link between their work and their cancer goes, as outlined earlier in this report, to the very heart of the proposed legislation.

3.29 In addition, this question of proving exposure leads to the fine point of difference between the current SRC Act and amendments proposed by this Bill. The latter would not require firefighters battling cancer to go out of their way to prove exposure. It would assume exposure to carcinogens for firefighters with a set number of years of service.

3.30 Slater and Gordon Lawyers pointed to the out that the Bill does not represent a significant departure from the SRC Act, but rather a narrowing of its intentions:

24 United Firefighters Union of Australia, *Supplementary submission 19*, p. 4.

25 Mr Andrew Kefford, Deputy Director-General, Chief Minister and Cabinet Directorate, Australian Capital Territory, *Proof Committee Hansard*, 23 August 2011, p. 5.

This Bill therefore represents an outcome of a type not only already specifically contemplated by the drafters of the current Section 7 [of the SRC Act], but is also narrower in application than that envisaged. It would be errant logic to conceive of this Bill as some new tipping point that will promote a flood of claims.²⁶

3.31 The Slater and Gordon submission argued that the effect of the proposed Bill is limited to:

...shift[ing] the balance of an evidentiary burden away from a severely injured worker and their family at a time where that family is likely experiencing significant stress. It shifts this burden to a professional administrator who has ready access to the resources and expertise necessary to assess the merits of the situation. Indeed, it is in many ways the core business of this administrator to make such assessments. It does not deny the administrator any legal defence that it may otherwise consider appropriate to rely upon in the given circumstances.²⁷

Committee view

3.32 The committee recognises that subsection 7(1) of the SRC Act already allows for a presumption that employment contributed significantly to a listed disease. However, critically, the Act still requires proof of exposure to be established by the claimant before the presumption can take effect. A firefighter would have to:

1. suffer from a disease listed under the SRC Act (which appears not to include all the cancers covered by the proposed legislation);
2. show that their employment involved a risk of exposure to particular chemicals prior to the disease; and
3. prove a link between the chemical and disease in question.

3.33 The committee considers the SRC Act an inadequate mechanism to achieve the objectives of the current Bill because of the heavy evidentiary burden it places on firefighters with cancer.

3.34 The Bill being considered relies on scientific evidence and assumes an association between the length of occupation as a firefighter and certain cancers. If the Bill is passed, firefighters with these primary site cancers will only have to prove length of service.

3.35 The committee acknowledges the volume of evidence received—particularly that from Slater and Gordon Lawyers—pointing out that the ultimate effect of this Bill would be to merely shift, not scrap, the evidentiary burden. The committee recognises

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

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

that the opportunity would still exist for employers and insurance agencies to overcome claims for compensation in cases where such claims were not warranted.

Costs

3.36 Workers' compensation claims through Comcare are funded by premiums paid for by governments:

The way our scheme operates is that it is very much an experience based scheme. You may be aware of some of the state and territory workers compensation schemes which have some elements of an experience base in terms of some of the claims experience and performance of individual employers but because of the size of the schemes and the number of employers they quite often operate on an industry basis et cetera. But our scheme is very much an employer based experience, so the premium which is charged in each year is based on the actual claims experience of the individual employers as well as the overall costs of the scheme itself.²⁸

3.37 The committee explored the possibility that the Bill could bring about significant increases in premiums by improving the ease with which firefighters can access compensation. However, based on overseas experience as well as the fact that the legislation would not provide for any new grounds to claim, the committee is of the view that there would be negligible impact on the Commonwealth or ACT budget.

3.38 For information on the cost impacts of similar presumptive legislation in other jurisdictions the committee considered evidence provided by the Fire Chief Ken Block of Edmonton Fire Rescue Services in Canada. Fire Chief Block informed the committee that the cost impact of presumptive legislation in Canada had been 'minimal if not negligible.'²⁹

3.39 To illustrate the point, Fire Chief Block cited the example of the province of Alberta, Canada, for the committee. Alberta introduced presumptive legislation in 2003, starting with seven cancers listed. In 2005 the province added lung cancer in non-smokers to its list of covered cancers, then expanded the list in 2010–2011 to include another six cancers. In all, Alberta now covers 14 cancers in its presumptive legislation.

3.40 There are approximately 13 500 firefighters in Alberta, of which 3500 are full-time firefighters and 10 000 volunteer or part-time. Figures provided for the committee show that in the period 2006–2010 there were 19 occupational cancer claims with the Alberta Workers Compensation Board (WCB).³⁰

28 Mr Steve Kibble, Comcare, *Proof Committee Hansard*, 23 August 2011, p. 12.

29 Fire Chief Ken Block, *Proof Committee Hansard*, 2 September 2011, p. 3.

30 Fire Chief Ken Block, *Submission 26*, p. 6.

3.41 The committee heard that the total cost of the WCB—including all workplace injury and illness claims—to the Edmonton Fire Rescue Services budget is less than two per cent of its \$158 million recurrent operating budget:

Within the two per cent of the Edmonton Fire Rescue Services recurrent operating budget it is estimated that there would be a very small percentage of work related illness falling within presumptive legislation coverage. Again, that two per cent encompasses all of the work related injuries, not just cancer.

...

From 2003 the WCB cost for Edmonton Fire Rescue Services was \$916,347, increasing over a seven-year period to \$2,332,414 in 2010. To put that into perspective, that is the equivalent of a \$202,295 increase per annum in total for all claims, not just occupational cancer under WCB—and, again, all claims include the range of work related illnesses, such as back injuries, sprains, strains et cetera.³¹

3.42 The committee also heard that much of the increase in costs can be attributed to increased staffing levels, with the Edmonton fire department growing by approximately 15 per cent over the past decade.

3.43 Fire Chief Block discussed with the committee the 'immeasurable but beneficial' impacts of presumptive legislation in Edmonton, Alberta. Raised awareness of the correlation between firefighting and certain cancers has led to a proactive approach to health awareness through the Edmonton Fire Rescue Services Health and Wellness program, introduced in 2005. The program encourages firefighters to undergo regular, voluntary medical assessments, which have resulted in early detection of cancers and subsequently a much higher survival rate.³²

Through early occupational cancer detection, there is transferring of costs between death benefits and issues such as lost time and medical claims. This is essentially a balancing and neutral costing, while detecting a cancer early and hopefully saving a firefighter, which is the right thing to do.³³

3.44 Raised health awareness and a proactive approach to health and wellbeing have also resulted in a positive change in employee engagement and have helped Edmonton Fire Rescue Services with recruitment and retention.³⁴

Committee view

3.45 The committee notes the experience-based evidence provided by Fire Chief Block. The committee also notes the very small number of claims lodged in Alberta,

31 Fire Chief Ken Block, *Proof Committee Hansard*, 2 September 2011, p. 3.

32 Fire Chief Ken Block, *Submission 26*, p. 7.

33 Fire Chief Ken Block, *Submission 26*, p. 7.

34 Fire Chief Ken Block, *Submission 26*, p. 7.

Canada, and has no reason to believe that the introduction of presumptive legislation here would lead to a flood of claims. Evidence suggests otherwise, as only a small number of firefighters will be in the unfortunate position of having to make a claim for occupational cancer.

3.46 On the basis of this evidence, the committee is confident that the cost impact of the proposed legislation would be as insignificant in Australia as it has been elsewhere.

3.47 The committee also notes with great interest that presumptive legislation overseas has led to greater health awareness, earlier detection of cancers and consequently a higher survival rate. First and foremost this is positive in terms of the firefighters' lives saved. However, it also leads to a reduced number of death benefits needing to be paid.

Coverage of volunteer firefighters

3.48 Some submissions sought clarification on which firefighters the Bill would cover.³⁵

3.49 The proposed legislation does not expressly differentiate between volunteer and professional firefighters, but subsection 7(9) includes the following definition of being employment as a firefighter:

(9) for the purpose of subsection (8):

(a) an employee is taken to have been employed as a firefighter if firefighting duties made up a substantial portion of his or her duties; and

(b) an employee who was employed as a firefighter for several periods that add up to the qualifying period is taken to have been so employed for the qualifying period.³⁶

3.50 This definition means that volunteer firefighters would not be covered by the legislation because firefighting does not comprise a substantial portion of their duties, nor would they be able to satisfy the requirements of the qualifying periods outlined in Chapter 1.

3.51 During the course of its inquiry the committee sought clarification as to why the proposed legislation did not seek to cover volunteers, who are covered in certain jurisdictions overseas. In response to its questions, the committee heard that the definition of volunteer firefighter differs between Australia and overseas:

35 See for example ACT Department of the Chief Minister and Cabinet, *Submission 24*, p. 1.

36 Subsection 7(9), Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011.

The definition of 'volunteer' in Canada is different from the definition of 'volunteer' here. In Canada, there is no such thing as a person who gives their labour or their services for no remuneration. They are paid on-call or are part-time firefighters.³⁷

Cause of illness and period of employment

3.52 Subsection 7(8) of the proposed legislation states:

(8) If an employee:

- (a) suffers a disease mentioned in the following table; and
- (b) before the disease was first diagnosed, was employed as a firefighter for the qualifying period mentioned for that disease; and
- (c) was exposed to the hazards of a fire scene during that period;

the employment is taken to have been the dominant cause of the contraction of the disease, unless the contrary is established.

3.53 Slater and Gordon Lawyers questioned why subsection 7(8) of the Bill employs the term 'dominant' instead of 'significant' cause, since the threshold test for entitlement elsewhere in the SRC Act is that employment contributed to a disease to a 'significant' degree:

It is not clear why the term dominant has been selected. The threshold test for entitlement to compensation for disease under the Act is that employment has contributed to a significant degree. The threshold test for significance is less than for dominance, so the use of the higher test will not disadvantage workers who otherwise qualify.³⁸

3.54 Slater and Gordon Lawyers also pointed out to the committee that section 7(9) of the Bill could result in unintended consequences. It currently states:

(9) (b) an employee who was employed as a firefighter for several periods that add up to the qualifying period is taken to have been so employed for the qualifying period.³⁹

3.55 The above subsection may risk being misinterpreted as not covering firefighters who have only accrued two, instead of 'several', periods of employment. Two periods and several periods can add up to the same number of years, each satisfying the required qualifying period.

37 Mr Peter Marshall, National Secretary, United Firefighters Union of Australia, *Proof Committee Hansard*, 2 September 2011, p. 34.

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

39 Subsection 7(9)(b), Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011.

Committee view

3.56 The committee agrees with the concerns expressed by Slater and Gordon Lawyers, and believes the reference to 'dominant' cause in the Bill should be revisited in order to preserve consistency within the SRC Act.

3.57 The committee also supports the view that the term 'several periods' of employment should be amended to 'more than one period' of employment.

Recommendation 2

3.58 The committee recommends that proposed subsection 7(8) of the Bill be amended to replace the term 'dominant' cause with 'significant' cause.

Recommendation 3

3.59 The committee recommends that proposed subsection 7(9)(b) of the Bill be amended to replace the term 'several periods' with 'more than one period'.

The case for non-rebuttable legislation

3.60 The committee is aware that some submitters, such as the ACT Branch of UFUA, believe the Bill should go further and provide stronger presumption of occupational cancer possible for firefighters. This would require the legislation to be non-rebuttable.⁴⁰

3.61 As already outlined, the Bill as it stands reverses the onus of proof from the individual to the employer or insurer, who can then rely on the rebuttable nature of this legislation to deny a firefighter's claim for compensation and have the case heard before the Administrative Appeals Tribunal or the Federal Court.⁴¹ Making the presumption non-rebuttable would render it automatic and not provide employers and insurers with the opportunity to reject a weak or unfounded claim for compensation.

3.62 The committee is not aware of significant support for this alternative approach. Furthermore, this is not the approach taken by leading jurisdictions across Canada and the United States.

3.63 The Bill as it stands enjoys support from the overwhelming majority of submissions to this inquiry. This, it should be mentioned, includes support from the ACT Branch of UFUA, which represents the firefighters who would be directly affected by this Bill:

40 See for example United Firefighters Union of Australia, ACT Branch, *Submission 18*, p. 5.

41 See United Firefighters Union of Australia, ACT Branch, *Submission 18*, p. 5.

The fact remains that whether it is one fire or one hundred fires, our compensation system should be designed in such a way that it protects firefighters, so that they can continue protecting Australian communities.⁴²

3.64 The committee is satisfied that the proposed presumptive legislation should remain rebuttable.

Committee view

3.65 The committee understands that this legislation would not create a new right or entitlement, and would not bring about a flood of new claims. Nor would it fundamentally change the nature of the Australian compensatory system. Rather, it would shift the burden of proof from a sick individual to their employer or insurer, and only in defined cases founded on premises supported by scientific research.

3.66 The committee notes that the proposed legislation as it stands could lead to firefighters with two periods of service, which nonetheless add up to the qualifying period, being denied compensation. For this reason the committee has recommended amending subsection 7(9)(b) of the Bill to replace the term 'several periods' with 'more than one period'. Similarly, noting that the threshold test for significance is less than for dominance, the committee has recommended that subsection 7(8) be amended to maintain consistency throughout the SRC Act.

3.67 The committee is convinced that this legislation removes, at least for some firefighters, the unreasonable impediment to compensation that currently exists. It is, the committee believes, legislation which finally recognises the scientifically demonstrated link between firefighting as an occupation and certain forms of cancer. As stated in 2002 when the Canadian province of Manitoba was considering the introduction of such legislation:

A presumption assumes that, all other things being equal, most cases of a certain type of cancer will be associated with occupational exposure, even though it is not possible to determine which case is actually caused by the occupation. A presumption is a way of being inclusive in the acceptance of such claims given that it is not possible to distinguish among them.

...

A presumption is also appropriate when the condition is rare and there is a pattern or strong suggestion of strong association with an occupation that may be concealed by other factor that complicate interpretation of the risk estimate.⁴³

42 United Firefighters Union of Australia, ACT Branch, *Submission 18*, p. 5.

43 Tee L. Guidotti and David F. Goldsmith, 'Report to the Workers Compensation Board of Manitoba on the Association Between Selected Cancers and the Occupation of a Firefighter', 28 March 2002, p. 8, as quoted in United Firefighters Union of Australia, *Submission 19*, p. 10.

3.68 On the weight of evidence the committee believes presumptive legislation is the most appropriate protective policy response to recognise the personal risk that firefighters take in the course of their careers and the sacrifices some of them will make.