



Occupational Health and Safety and Other Legislation Amendment Bill 2009

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Contents

Purpose.	2
Background.	2
Productivity Commission report.	3
Corporate moves to self-insurance	4
Moratorium and review	5
Committee consideration.	6
Financial implications	6
Main provisions.	6
Off-site recess breaks	7
Payment of medical expenses	8
Statutory time limits	9
Access to consolidated revenue fund	9

Occupational Health and Safety and Other Legislation Amendment Bill 2009

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Portfolio: Education, Employment and Workplace Relations

Commencement: Schedules 1–4 on the day after the Royal Assent; all other provisions on the day of the Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The primary purpose of the Bill is to amend the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) to:

- consider claims arising from off-site recess injuries¹
- allow for compensation for medical expenses to be paid, where payment of other compensation is suspended
- require that claims for workers' compensation are determined with specified time limits, and
- authorise Comcare to access the Consolidated Revenue Fund to pay compensation claims in respect of certain diseases with a long latency period.

Background

In Australia, constitutional responsibility for workers' compensation has traditionally resided with state and territory governments. As a result, there are significant inconsistencies between the compensation schemes in areas such as:

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1. A worker's entitlement to compensation generally is based on an injury which arises out of, or in the course of, his or her employment. Jurisdictions vary as to whether coverage extends to injuries that occur during lunch times or other breaks, and whether those injuries occur within the workplace or off-site. For example, a worker who injures his knee when he slips on the floor of the office tea room, compared to a worker who injures his knee during a game of touch football whilst on his lunch break.

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- eligibility for workers' compensation
- the range and level of payments
- access to common law damages
- premium setting principles
- injury management arrangements, and
- dispute resolution mechanisms.²

Issues arising from these inconsistencies have, from time to time, attracted the attention of policymakers and scheme administrators.³ In March 2004, the Productivity Commission released a report entitled *National Workers' Compensation and Occupational Health and Safety Frameworks* (the Productivity Commission report) which put the matter back on the political agenda.⁴

Productivity Commission report

The Productivity Commission proposed a model to move Australia progressively to nationally consistent arrangements—in particular that the Government develop an alternative national workers' compensation scheme to operate in parallel with existing state schemes under a three step process.⁵

The first step was confined to corporations deemed capable of meeting 'the competition test'. This test is set out in section 100 of the SRC Act which provides that the Minister may determine that a corporation is eligible to be granted a self-insurance licence⁶ if it:

- is, but is about to cease to be, a Commonwealth authority or

2. K Purse, R Guthrie and F Meredith, 'Faulty frameworks: the Productivity Commission and Workers' Compensation', *Australian Journal of Labour Law*, Vol. 17, No. 3, December 2004, p. 306.

3. In the early 1970s the Woodhouse Committee called for the dissolution of state and territory workers' compensation schemes and the establishment of a comprehensive national accident compensation scheme, based on the New Zealand model. A further attempt was proposed in an Industry Commission report prepared in the early 1990s.

4. Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks, Final Report*, AGPS, Canberra, 2004, viewed 21 December 2009, <http://www.pc.gov.au/projects/inquiry/workerscomp/docs/finalreport>

5. The Treasury, *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27*, paragraph 5, viewed 4 January 2010, http://www.treasurer.gov.au/Ministers/phc/Content/publications/pub_downloads/Workers_Compensation_Response.pdf

6. A self-insurance licence enables Commonwealth authorities and certain corporations to accept liability for, and/or manage, their own claims.

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- was previously a Commonwealth authority, or
- is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority.

The second and third steps related to the establishment of a national workers' compensation scheme.

The Howard Government accepted that self-insurance licences could be granted under the existing provisions of the SRC Act.⁷ However it did not support the other steps of the Productivity Commission's proposed model.⁸

Corporate moves to self-insurance

Shortly after the Productivity Commission's report in March 2004, Optus Administration Pty Ltd (Optus) made application under section 100 of the SRC Act seeking a self-insurance licence. That licence was subsequently granted in November 2004 on the grounds that Optus was able to satisfy the 'competition test' in that it was carrying on a business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority, being Telstra. This was followed by applications for national self-insurer status from other major Australian corporations including Toll Transport Pty Ltd, the National Australia Bank, John Holland Pty Ltd and ADI Limited.⁹

However, those corporations which were granted a self-insurance licence under the SRC Act were still required to comply with relevant state and territory OHS laws, rather than federal laws. The Productivity Commission report had recommended that the *Occupational Health and Safety (Commonwealth Employment) Act 1991* be amended to enable those employers who are licensed to self-insure under the Australian Government's workers' compensation scheme to be covered by the Australian Government's occupational health and safety legislation.¹⁰ The Howard Government subsequently enacted amending legislation in 2006 the effect of which was to cover national self-insurers under federal workplace health and safety laws.¹¹

7. The Treasury, Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, op. cit., paragraph 37.

8. P Costello MP (then Treasurer), 'Response to Productivity Commission Report on Workers' Compensation and Occupational Health and Safety', *Media Release No. 054*, Canberra, 24 June 2004.

9. K Purse, 'Workers' compensation, OHS and the 'new' federalism', *National Safety*, Vol. 78, No. 6, July 2007, p. 108.

10. Productivity Commission, op. cit., p. 104.

11. *OHS and SRC Legislation Amendment Act 2006*.

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Moratorium and review

On 11 December 2007, the newly elected Rudd Government announced a moratorium on corporations joining the Comcare scheme and a review of self-insurance arrangements under the scheme.¹²

The Report of the Review of Self-insurance arrangements under the Comcare Scheme (Review report) was published in January 2009.¹³ The Review report states that:

The Department found that, overall, the scheme's range of compensation benefits, and approach to OHS regulation, were comparable with other Australian workers' compensation schemes. In this respect, the provision of self-insurance licenses to private-sector corporations was not seen as placing them or their employees at a disadvantage. Similarly, the Department found no evidence that licensing posed risks to the scheme's viability or the viability of state or territory schemes.¹⁴

Despite this conclusion, the moratorium on corporations joining the Comcare scheme will continue until the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA) comes into effect.¹⁵ The IGA outlines the commitment of all states and territories and the Commonwealth to work together to develop and implement model OHS legislation. Minister Gillard stated that:

Given the progress towards harmonised national OHS laws and the proposed transfer of OHS coverage for Comcare self-insurers to the states and territories, the Government will maintain the moratorium [on private sector companies seeking to join the Comcare scheme] until 2011 when uniform OHS laws have been implemented in all jurisdictions.

To do otherwise would cause unnecessary dislocation in that companies would need to adapt to Comcare and then quickly change again to adapt to the new model laws.

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12. J Gillard MP (Minister for Education, Minister for Employment and Workplace Relations), 'Government announces moratorium on new companies joining Comcare', *Media Release*, 11 December 2007, viewed 14 December 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FTM8P6%22>
 13. Department of Education, Employment and Workplace Relations, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, viewed on 14 December 2009, http://www.deewr.gov.au/WorkplaceRelations/Policies/ComcareReview/Documents/DEEWR_ReportComcareReview.pdf
 14. *Ibid.*, p. 2.
 15. Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, viewed on 15 December 2009, http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/OHS_IGA.pdf

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The Government will introduce legislation to give effect to the moratorium for this further period.¹⁶

In response to the Review report, the Rudd Government announced that it would make a number of improvements to the Comcare scheme.¹⁷ Some of those improvements have already been made, such as the increase in the amount of death benefits payable.¹⁸ This Bill contains further improvements.

Committee consideration

The Bill has been referred to the Education, Employment and Workplace Relations Legislation Committee for inquiry and report by 25 February 2009.¹⁹ At the time of writing this Digest, no submissions had been received by the Committee.

Financial implications

According to the Explanatory Memorandum, the proposed amendment to the SRC Act which will reinstate coverage for off-site recess breaks is estimated to cost Comcare \$1.7m for the 2009–10 financial year, and the same for the forward years (adjusted for indexation of 4.5 percent per annum). However, these increased costs are expected to be partially offset by an estimated net savings to the Pharmaceutical Benefits Scheme of \$130 000 for the 2009–10 financial year and the same amount, indexed for medical cost inflation, over the forward years.²⁰

The remaining amendments are expected to have a nil financial impact.²¹

Main provisions

Under the *Occupational Health and Safety Act 1991* (OHS Act), it is the employer's responsibility to take reasonably practicable steps to:

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16. J Gillard MP (Minister for Education, Minister for Employment and Workplace Relations), 'Improvements to the Comcare scheme announced', *Media Release*, 25 September 2009, viewed 15 December 2009, http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_090925_182334.aspx.
 17. *Ibid.*
 18. Amended by the *Employment and Workplace Relations Amendment Act 2009*.
 19. Details of the inquiry are at: http://www.aph.gov.au/Senate/committee/eet_ctte/oh_s/index.htm, viewed 5 January 2010.
 20. Explanatory Memorandum, p. ii.
 21. *Ibid.*

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- protect the health and safety at work of the employer's employees²²
- provide and maintain a working environment (including plant systems of work) that is safe and without risk to their employees' health,²³ and
- ensure that workplaces under the employer's control are safe and without risk to their employees' health, and that safe means of access to, and exit from, the workplace is provided and maintained.²⁴

Lifts are not currently included in the definition of '*plant*' under the OHS Act and they are not covered by any other relevant regulations. **Item 2** of **Schedule 1** to the Bill amends the OHS Act by inserting a definition of '*lift*' in existing subsection 5(1). **Item 3** inserts an example at the end of the definition of '*plant*' so that it is clear that any references to plant in the OHS Act will include a reference to a lift. **Item 13** inserts **proposed subsection 19(4)** to remove the supply of a lift in a workplace from the operation of that section.

Items 5, 7 and 9–11 repeal references to 'notice in writing' and substitute references to 'legislative instrument'. These are technical amendments to reflect the terms of the *Legislative Instruments Act 2003* (Legislative Instruments Act). **Items 4, 6 and 12** are consequential amendments arising from those substitutions.

Items 1 and 2 of **Schedule 2** to the Bill make technical amendments to the *Occupational Health and Safety (Maritime Industry) Act 1993* which clarify that approval of, or amendment to, a Code of Practice under that Act is a legislative instrument in accordance with the Legislative Instruments Act. Similarly a notice of revocation of a Code of Practice is also a legislative instrument.

Schedule 3 amends the SRC Act, as discussed below.

Off-site recess breaks

Item 1 of **Schedule 3** amends existing paragraph 6(1)(b) of the SRC Act so that an injury to an employee is taken to have arisen out of, or in the course of, employment if it occurs while the employee is temporarily absent from his or her place of work during an ordinary recess. The right to workers compensation in respect of injuries that occur during an off-site recess was removed by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* with effect from 13 April 2007. The Explanatory Memorandum for that Act stated:

The effect of the provision is that workers' compensation could be payable, for example, where an employee sustains an injury while shopping or playing sport

22. Subsection 16(1) of the OHS Act.

23. Paragraph 16(2)(a) of the OHS Act.

24. Paragraph 16(2)(b) of the OHS Act.

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during a lunch break. This is notwithstanding the fact that the employer has no control over the activities of the employee or the environment in which the employee engages in those activities.

The Productivity Commission Inquiry found that the employer's ability to exert control over workplace recess breaks and social activities is a relevant consideration. It recommended that coverage for recess breaks and work-related events be restricted, on the basis of employer control, to those undertaken at workplaces and at employer-sanctioned events.²⁵

The reinstatement of eligibility for workers' compensation in respect of injuries sustained off-site is based on the need to 'realign the Comcare scheme with most jurisdictions and removed the inequity in coverage for employees whose employers do not provide on-site facilities for meal breaks'.²⁶

Payment of medical expenses

Where a person sustains an injury arising out of, or in the course of, his or her employment that person is entitled to be paid compensation in accordance with the SRC Act.²⁷ Compensation generally has two components—a weekly benefits payment for loss of wages due to the person's incapacity to work,²⁸ and a payment for hospital, medical and pharmaceutical expenses incurred as a result of the injury.²⁹

Section 36 of the SRC Act provides that an injured worker may be required to be assessed to determine his or her capacity to undertake rehabilitation. Where the injured worker refuses to be assessed, or fails to attend the assessment without 'reasonable excuse', his or her right to compensation is suspended in accordance with subsection 36(4) of the SRC Act. The rationale for such a provision is that it acts as an incentive to claimants to comply with the requirement. **Item 2** inserts **proposed subsection 36(4A)** which will limit the suspension to weekly benefits only. This amendment responds to concerns that the suspension of medical benefits under the Comcare scheme can, contrary to the purpose of the scheme, undermine efforts towards early rehabilitation and return to work.

25. Explanatory Memorandum, Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006, p. xiii.

26. J Clare MP (Parliamentary Secretary for Employment), 'Second reading speech: Occupational Health and Safety and Other Legislation Amendment Bill 2009', *House Hansard*, 26 November 2009, p. 12963, viewed 21 December 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-11-26%2F0005%22>

27. Section 14 of the SRC Act.

28. Section 19 of the SRC Act.

29. Section 16 of the SRC Act.

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Item 3 inserts **proposed subsection 37(7A)** into the SRC Act to limit the suspension of a person's right to compensation to weekly benefits only, if he or she refuses or fails to undertake a rehabilitation program without a 'reasonable excuse'. **Item 4** inserts **proposed subsection 50(5A)** in similar terms to limit any suspension of a person's rights to compensation to weekly benefits only.

Statutory time limits

Existing section 61 of the SRC Act requires that a claimant for compensation be given a written statement setting out the terms under which his or her claim has been accepted or rejected, and the reasons for that decision. **Item 5** of Schedule 3 inserts **proposed subsection 61(1A)** which requires that each claim for compensation is considered and determined within the period prescribed by regulations.

Item 6 inserts **proposed subsection 62(6)** which will require that each request for reconsideration of a decision to accept or reject a claim for compensation is considered and determined within the period prescribed by regulations. There is no indication as to the length of the proposed period in the Explanatory Memorandum or the second reading speech. However the Review report states:

The Department envisages that statutory limits could be imposed along the following lines.

Time would start to run from lodgement of a claim with the determining authority, with scope for extension of that time frame to accommodate later lodgement of supporting evidence (say, 20 business days for injuries). A longer time frame (to be determined after consultation) could apply to the determination of disease claims, bearing in mind that these can be more difficult to assess.³⁰

Unfortunately the Bill does not include any sanctions for failure to meet the proposed statutory time limits. As the primary focus of the Comcare scheme is rehabilitation and return to work, the absence of sanctions for a failure to meet statutory time limits for decision making may detract from the achievement of this goal.

Access to consolidated revenue fund

Item 7 of **Schedule 3** inserts **proposed paragraph 90B(ab)** into the SRC Act. The effect of the new provision will allow Comcare access to the Consolidated Revenue Fund for payment of its liabilities in respect of events which happened before 1 December 1988 but which did not result in an injury until after that date. This item is directed towards long latency injuries, for example lung disease or skin disease.

30. Department of Education, Employment and Workplace Relations, op. cit, p. 22.

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Items 8 and 9 of Schedule 3 are consequential amendments. Together, **items 7–9** operate to restore Comcare’s access to the Consolidated Revenue Fund which was closed off in response to comments about the interpretation of section 128 of the *Commonwealth Employees’ Rehabilitation and Compensation Act 1988* which were made by the Full Court of the Federal Court of Australia in the decision of *Comcare v Etheridge*.³¹

Schedule 4 of the Bill makes a number of technical amendments to the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) to take into account the commencement of the Legislative Instruments Act. None of the amendments affect the operation of the existing provisions of the Seafarers Act.

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31. *Comcare v Etheridge* [2006] FCAFC 27 (15 March 2006), paragraph 61, viewed 21 December 2009, <http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/27.html>

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