SAFETY, REHABILITATION AND COMPENSATION LEGISLATION AMENDMENT BILL 2014

About Slater & Gordon Lawyers

1. Slater & Gordon provides legal assistance and representation to injured workers across all jurisdictions in relation to the eleven workers' compensation schemes operating in Australia. The firm has also handled some of the most complex and ground breaking common law cases in Australia that have resulted in significant advances in workplace and public health and safety. As well as assisting individuals, Slater & Gordon provides advice to unions and assists them in their work to ensure the Comcare scheme meets its obligations to injured workers. Slater & Gordon centralised its federal workers' compensation practice in 2009 and acts for workers covered by the scheme in all states and territories.

2. We are able to assist the Senate Education and Employment Legislation Committee in relation to questions it may have about the impact of the *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014* on the entitlements of injured workers. We also make observations about the impact of the Bill upon occupational health and safety and the application of 'return to work obligations' of employers.

Background

3. On 19 March 2014, the Federal Government introduced the *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014* (the Bill) into Parliament as part of a package of Bills designed to 'cut red tape' for business.

4. The Bill introduces a series of exclusions to the entitlements of injured workers under Comcare, and opens the way for a major expansion of the scheme by lowering the threshold for private sector employer eligibility to obtain a self-insurance license and simplifying application processes.

5. The proposed amendments also propose to extend the coverage of the *Work Health and Safety Act 2011 (Cth)* (Comcare Health and Safety regulations) to all corporations that obtain a license under the SRC Act. This would abolish the jurisdiction of state health and safety regulators in relation to self-insurers under Comcare, particularly new licensees, and reverse an initiative of the previous Government.

6. The precise impact on the rights and entitlements of injured workers, if their employer chooses to self-insure under Comcare, differs state by state. In most jurisdictions (except the NT and SA) injured workers would lose access to common law protection and compensation. With the exception of the NT, SA and Comcare, most other workers' compensation schemes in Australia are 'hybrid' schemes that include both 'no-fault' statutory entitlements and common law compensation for injuries.

7. The *'Comparison of Workers' Compensation Arrangements in Australia and New Zealand'* produced by Safe Work Australia provides details about differing arrangements and benefit structures under each Australian Workers' Compensation scheme.

Executive Summary

- Central to this submission is the policy priority we believe should be given to the health and safety of all workers and to the protection of vulnerable injured workers.

- In summary, the Bill directly and indirectly reduces the rights and entitlements of workers who rely upon or will in the future rely upon the Comcare scheme.

- The Bill aims to 'open up' the Comcare scheme to private employers who wish to self-insure. The limited capacity and regulatory resources of the relatively small Comcare scheme mean there are significant

risks for workers arising from lack of health and safety monitoring, lack of monitoring to ensure employers meet 'return to work' obligations and reduced employer obligations to make medical and other compensation payments when workers are injured, compared to many other schemes.

- Introduction of the 'national employer' test, the new 'group employer' provisions and simpler application processes for employers, will most likely lead to an expansion of Comcare at the expense of state and territory schemes, with a number of significant consequences for the Australian workforce. We note employer premiums under Comcare are significantly cheaper compared to other schemes.[1]

- It is not in the interests of the Australian workforce that the Comcare jurisdiction be expanded owing to the origins of the scheme, the small size and limited experience of the Comcare inspectorate which is not administratively resourced to protect the workplace health and safety of workers on a national basis and for many workers, an inferior workers' compensation framework.

- The Comcare inspectorate is not adequately resourced to oversee other obligations of employers including the obligation upon employers to find suitable duties for injured workers who are able and willing to return to work.

- It is significant that Comcare is one of the few jurisdictions to record a drop in its durable return to work rate over the last 5 years (-7%). At the same time national return to work rates have been relatively steady, with modest improvements in some jurisdictions[2].

- The Comcare dispute resolution system and the under-resourced Administrative Appeals Tribunal are not equipped to deal with an influx of new self-insured employers. Disputes under the Comcare scheme already take much longer than State schemes to resolve[3].

- The Bill waters down the concept of a no-fault scheme through the expansion of a number of exclusions that would operate to prevent injured workers from receiving medical assistance and compensation.

- The Bill does not adopt the positive amendments proposed by the Hanks Review, which would make the scheme fairer, improve the clarity of the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) and make the overall operation of the scheme more effective. This includes placing a time frame upon insurers/employers to make decisions in relation to liability for an injured worker's claim.

Recommendations

8. The primary objectives of Comcare should be to:

    8.1. Oversee safe workplaces and environments for employees currently covered by the scheme;
    8.2. Ensure injured workers are supported by timely medical care, rehabilitation and where necessary, vocational assistance to recover and wherever possible, return to work as quickly as possible;
    8.3. Provide fair and equitable workers' compensation benefits for the injured with timely accessible dispute resolution process.

9. Before expansion of the Comcare scheme is considered further, it is critical to ensure the above objectives are being met.

10. We submit this Bill should be withdrawn because there is an absence of policy justification for expanding self-insurance under Comcare and because the potential for the cost of workplace injuries to shift from workers' compensation schemes to the injured worker, their families, welfare agencies and the public system.

11. Alternatively, the Committee should consider the following substantial amendments to the Bill:

---

[1] "Comparative Performance Monitoring Report" Fifth Edition October 2013, p24, Safe Work Australia
[2] *Comparative Performance Monitoring Report*, 13th Edition, Safe Work Australia, p37
[3] Ibid, p42

11.1. Remove the proposed move back to Comcare as a single Work, Health & Safety Regulator on the basis that it does not have sufficient regulatory capacity;

11.2. Remove the introduction of the 'national employer' and 'group employer' tests because the costs that will fall to injured workers and their families are greater than any potential savings for employers; and

11.3. Remove the expansion of exclusions that would prevent injured workers from receiving assistance and water down the no-fault elements of the system.

12. Further, as the moratorium has now been lifted, it is critical that key recommendations of the Hanks Review to improve the Comcare scheme are included in Safety, Rehabilitation and Compensation Act (SRCA) including the following:

12.1. Timeframes be introduced for decision-making and a mechanism for review when such timeframes are not met;

12.2. Normal Weekly Earnings should be re-assessed to take into account the broader range of employees now covered by the scheme and the changing basis upon which employees are remunerated;

12.3. The age restriction on weekly payments should be increased to reflect that eligibility for the Age Pension namely 67 and in time, 70 (benefits for injured workers under the SRCA currently cease at age 65); and

12.4. Provisional liability should be introduced to facilitate early medical intervention and return to work, thereby leading to the reduction in the length of claims.

Work Health and Safety Safeguards – Return to Comcare as Single Regulator

13. In 2011, the Commonwealth Government amended the *Work Health & Safety Act* to address major gaps in Comcare's regulatory capacity by requiring corporations entering the Comcare scheme to continue to comply with requirements of state based health and safety regulations. This was effective from 1 January 2012. The Bill proposes to reverse this requirement.

14. We are concerned by this move, not least because Comcare has a small inspectorate (44 inspectors nationally) and does not have adequate capacity or experience to enforce WH&S standards nationally across a wide group of industries.

15. With a small inspectorate nationally, the Comcare scheme has had a significantly lower rate of proactive health and safety interventions compared to other schemes (state regulators). Comcare has historically initiated low rates of prosecutions. This is doubly concerning because this substantially no-fault scheme is not able to expose safety failures through common law or other examination processes.

16. The Regulation Impact Statement (RIS) released with the Bill cites minor savings for major corporations as the rationale but this will come at a high price, particularly for workers in high-risk industries.

New Tests for Employer Eligibility to Self-Insure under Comcare

17. The proposed amendments significantly widen the ability of private sector employers to obtain self-insurance licenses under the SRCA.

18. The proposed amendments remove the 'competition test', which is a critical filter upon the corporations that can be licensed. Under the proposed amendments, any *national employer* as defined in the proposed section 100(1) may apply for a license.

19. The proposed amendments also permit groups of related companies to make an application for a single license covering all companies in the group. A 'group' will be constituted where each corporation is related to each other corporation within the meaning of ss. 50 and 46 of the *Corporations Law.*

20. State workers' compensation schemes are significantly more supportive of injured workers and in key areas such as return to work, achieve better results than Comcare.

21. Access for injured workers to the common law, both the exposure the common law gives to health and safety failures and fair compensation for injury, is effectively lost to injured workers if an employer chooses to shift from a state workers' compensation scheme to self-insurance under the new Comcare arrangements. In all other jurisdictions, except NT and SA, injured workers retain common law rights. In SA, the Government has recently undertaken to return these rights. This is in comparison to the SRCA where a 10% whole person impairment following an injury due to the negligence of the employer allows the worker to sue for non-economic loss up to a maximum amount of $110,000[4] in the most serious cases. The sum is not indexed and has remained at $110,000 since 1988. Accordingly, the amendments will have the effect of significantly reducing benefits and health and safety protection for the vast majority of Australian workers.

22. Further, the processes whereby self-insurers under the scheme manage claims, particularly given the potential for an influx of new inexperienced self-insurers, will delay access to medical and rehabilitation payments and delay payments to injured employees. This will result in financial hardship and a shift of the cost of workplace injuries to the injured worker, their families and to the public health and welfare system.

23. The proposed licensing arrangements mean large or small companies with no experience of self-insurance could form a 'group' for the purposes of self-insuring under Comcare. The Federal Government again cites savings for companies as the rationale.

24. The RIS conceptualizes equity as workers within a group of companies having the same rights, without reference to the fact most workers would lose health and safety protection and rights as a consequence of a shift out of a state scheme.

25. Given Comcare's small capacity to monitor and regulate self-insurers and the limited powers and resources of the Administrative Appeals Tribunal (AAT), the Bill taken as a whole, effectively de-regulates health and safety, return to work and workers' compensation obligations of, at this stage, an inestimable number of employers. This takes developments in work place health and safety in Australia back 40 years to achieve the policy aim of 'cutting red tape'.

Abolition of the 'competition test'

26. The 'competition test' currently confines eligibility to join the Comcare scheme to Commonwealth authorities, privatized Commonwealth authorities and corporations in competition with either. The Bill proposes to abolish this test and replace it with a new 'national employer' test.

27. The Bill seeks to amend section 100 of the SRCA by introducing a definition of a "national employer" for the purposes of licensing. A "national employer" means a corporation required to meet obligations under workers' compensation law in two or more Australian jurisdictions or is a self-insurer or self-insured employer in two or more Australian jurisdictions.

28. If the Bill is passed, applications to join the Comcare scheme would also be simpler as there would no longer be a need for the Minister to make a declaration on the 'eligibility' of an employer to join the scheme. Employers would apply in 'one step' to the Safety, Rehabilitation and Compensation Commission (SRCC) for a self-insurance license.

29. The effect of repealing section 4(1) and amending section 100 of the SRCA, together with simpler application processes, creates a lesser test and a wider gate for corporations to be granted self-insurance rights under Comcare. Whereas previously only corporations in competition with a Commonwealth Authority (for example, Australia Post and Telstra) were eligible, now all Corporations operating in two or more states or territories are entitled to apply for a license. Additionally, companies that only operate in one state can join a 'group' to self-insure under Comcare if they do not meet the 'national employer' test. The proposed section 104(2A) also means licenses could be given to corporations who held a license immediately before the commencement of this section (whether or not they meet the new test).

[4] Section 45 SRCA.

30. Some concerns regarding the proposed amendments are summarised as follows:
    30.1. The definition of 'national employer' does not specify a minimum number of employees required in a particular Australian jurisdiction;
    30.2. Workers under state workers' compensation regimes will be disadvantaged by a loss of critical rights, particularly the loss of common law protection;
    30.3. Comcare provides little, and in most regions of Australia, no health and safety monitoring;
    30.4. Comcare has historically had inferior performance on the critical measure of assisting injured workers to return to work. Self-insurance will be open to abuse by employers who do not wish to assist injured workers to return to work because Comcare is not adequately equipped to monitor performance or hold self-insurers to account on a national scale if the self-insurer does not meet return to work obligations; and
    30.5. The likelihood and impact of an exodus of employers from State schemes and the undermining of the viability of state schemes has not been adequately addressed.

Proposed 'Group Employer Licenses

31. Proposed changes to section 98A of the SRCA would allow "single employer licenses" and "group employer licenses" to be granted.

32. Proposed changes to the legislation would allow a 'group employer' license to be granted if:
    32.1. At least one corporation in the group is a National Employer; or
    32.2. At least one corporation in the group has employer obligations in a particular Australian jurisdiction and at least one other corporation in the group has employer obligations in another Australian jurisdiction.

33. The concern for workers is that despite a company only operating in one Australian jurisdiction, it may seek to participate in the Comcare scheme by virtue of an association with a separate body corporate operating in another Australian jurisdiction. Such a provision allows for employers to by-pass state workers' compensation and health and safety legislation. No minimum number of employees is required for issuing 'group employer' licenses.

34. Where a group license is approved, one corporation in a Corporate Group must be nominated as the "Relevant Authority" for the license and would be the decision maker for the group. The *Relevant Authority* would therefore be issuing decisions with respect to liability in relation to a company of which it may have little knowledge. A potential result is the *Relevant Authority* will make decisions with respect to liability for injury, treatment, incapacity and other payments in the absence of knowledge.

Changes in access to compensation – watering down the concept of a no-fault

New exclusion - Injury caused by 'misconduct'

35. The Bill proposes to amend section 14(3) of the SRCA by excluding compensation for all injuries alleged to be caused by the "serious and willful misconduct of the employee".

36. Currently, compensation for injuries caused by serious and willful misconduct of the employee can be paid, assuming injury was not intentionally self-inflicted, if the injury resulted in death, or serious and permanent impairment. The drafters of the SRCA saw fit to exclude workers severely injured or deceased owing to the difficulties facing such a class of worker in proving their case. We note that all other workers' compensation jurisdictions have similar provisions[5].

37. 'Wilful' denotes the behaviour to be intentional or deliberate; however, as the deceased has no opportunity to defend his or her actions, the insurer's decision to deny liability will be hard to overcome. A similar argument can be made for those with catastrophic injuries, particularly if they have lost the capacity to articulate the circumstances surrounding the accident.

[5] section 14(2) of the *Workers' Compensation Act 1987* (NSW), section 130 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) and section 22 of the *Workers' Compensation and Injury Management Act 1981* (WA).

38. It is not unrealistic or rare that significantly injured workers who survive a traumatic accident are unable to give clear evidence about the circumstances of an accident because of lack of capacity or memory loss.

39. The SRCA provides that the accuser bears the onus of proof. It will be relatively easy, however, for an employer to discharge the onus in the face of a significantly incapacitated or deceased worker. We have serious doubts this process will enable a decision-maker or subsequent Tribunal to make 'the most correct or preferable decision' as required by the *Administrative Appeals Tribunal Act 1975*, in the face of an employer allegation that a deceased or significantly injured worker is incapable of rebutting.

40. There are evidentiary issues for injured workers who suffer a significant injury such as a brain injury or injuries which cause a lack of consciousness, as well as those injured workers who suffer memory loss either as a result of the injury itself or due to the effect of treatment and pain medication.

41. In addition, the Fair Work Commission and its predecessors have on countless occasions recognised safety breaches as valid reasons for dismissal and misconduct. Such breaches may also contravene statutory obligations that are enforceable as an offence, which increases the likelihood that such breaches would be described as serious misconduct at least by employers. In those circumstances, there is some risk these amendments would leave a worker both without a job and without any compensation for a mistake they have already paid an enormous price for in the form of a serious injury.

42. The RIS at 2.6 states, "*In the circumstances where a claimants' injury is the result of their own serious and willful misconduct, community expectations are that the injury would not be compensable".* It is our experience that this statement misreads the way in which many in the community view the misfortune of fatal and catastrophic injuries and their impacts upon individual workers and their families.

43. Arguably this amendment is also in policy contradiction with a separate Commonwealth policy process underway to implement a National Disability Insurance scheme (NDIS) and a National Injury Insurance Scheme (NIIS). If seriously and permanent injured workers were to be excluded from Comcare benefits on a no-fault basis, they may apply for the taxpayer funded NDIS for disability care and support services, thereby shifting the burden and cost of the workplace injury from the insurer/employer to the taxpayer funded scheme, public health services and families

Re-introduction of Exclusion - 'Recess in Employment'

44. When the SRCA was enacted in 1988, it provided compensation for workers who were temporarily absent from their place of employment during an ordinary recess (for example, while on a lunch break). In 2007, recess claims were removed from the scheme, and in 2011, re-instated.

45. The Bill proposes to yet again remove this entitlement. Access to compensation for injuries sustained at the workplace during a recess is not affected, and a worker will still be entitled to compensation if he or she was injured during an off-site recess if it is at the direction of the employer.

46. Injuries during recess breaks are covered in most major schemes[6] as they are seen as part and parcel of a worker's employment. That is, 'but for' a workers' attendance at work, they would not have been injured. Indeed, the drafters of the SRCA considered it an appropriate protection for workers and we submit therefore, it should be maintained.

47. We consider removing this entitlement will be particularly detrimental to a vast number of employees who do not have a fixed place of work. Some examples are police and emergency services workers, road construction workers and tradespeople. Those workers who do not work at a fixed work site are generally not provided with a clear and safe designated place in which to take their break. Consequently, they are in danger of being denied the same safeguards and benefits as those workers with a defined work place if liability for injuries sustained during a break is now placed into question.

[6] section 83 of the *Accident Compensation Act 1985* (Vic) and section 11 of the *Workers Compensation Act 1987* (NSW)

Extension of Exclusions - Submission to an Abnormal Risk of Injury

48. Currently a worker who "voluntarily and unreasonably submit[s] to an abnormal risk of injury", will only be denied liability if the injury is suffered either "at a place" or during an ordinary recess. That is, in circumstances where they have not sustained the injuries whilst undertaking their usual employment duties.

49. The Bill proposes to amend section 6(3) of the SRCA, extending the operation of the exclusion to include injuries sustained whilst a worker is undertaking their usual employment duties.

50. The SRCA provides no definition of what is considered an abnormal risk of injury and neither does it define what constitutes "voluntarily" or "unreasonably". The absence of definitions will arguably permit insurers to make decisions about what is an "abnormal risk of injury" and about whether the injured worker "voluntarily and unreasonably" submitted to such an injury.

51. There is no protection for workers who are asked or *persuaded* to undertake dangerous tasks by a representative of their employer. In these cases, although the worker may understand they are submitting themselves to an abnormal risk, they must weigh this risk against disobeying an order. As neither the SRCA nor the Bill imputes a reasonable person test, the injured worker is ultimately at the mercy of the insurer to determine whether liability for the injury should or should not be accepted.

52. Should the Committee wish, we are able to provide illustrative examples.

Absence of Time Frames and Provisional Liability

53. A considerable difficulty with the Comcare scheme is a lack of requirement to provide a decision to accept or deny liability within a specified time. This is in contrast to the state legislative schemes. Comparative time frames for submission of claims by injured workers and decision making, obligations of employers and decisions by insurers in other workers' compensation schemes are found in the *Comparison of workers' compensation arrangements in Australia and New Zealand.* The Commonwealth with its lack of time frames for decision making is an outlier.

54. Early intervention is crucial in reducing the lifecycle of an injury. Provisional liability should be introduced to enable employees' timely access to treatment and rehabilitation. Many employees cannot afford the cost of even the most basic treatment and wait months, in some cases, for a decision about whether treatment expenses will be met. By the time they obtain treatment, in many cases, the condition has become chronic and resistant to treatment.

55. Provisional liability arrangements are found in a variety of forms in Australian workers' compensation jurisdictions[7]. This enables insurers and employers in consultation with the worker's treating doctor, to put in place early intervention, treatment and a return to work plan. State and Territory schemes that do not have provisional liability arrangements generally have time frames of between 1-14 days for payments to be provided by the insurer with the requirement commencing from either the day of the "assessment" the "receipt of a claim" or the acceptance of liability. Only Comcare, DVA and the Northern Territory appear to have minimal or no regulated time frames for acceptance of liability, the commencement of weekly income benefits or medical expenses.

56. As there is no requirement for provisional liability to be provided whilst Comcare or a licensee determines ongoing liability, the injured worker is required to support themselves and their family without any benefits. Despite the hardship placed on an injured worker and their family, as initial treatment is not required to be accepted, this also means in many cases an injured worker is not able to access treatment which would reduce the severity of their injuries and return them to employment in a shorter period of time.

Operation of the Administrative Appeals Tribunal

57. In addition to waiting long periods for insurers/employers to make decisions, injured workers under Comcare wait significantly longer for dispute resolution than injured workers in any other scheme. For example in 2011-12, 51.6 % of injured workers with disputed claims under Comcare did not have their

[7] sections 275 and 280 of the *Workplace Injury and Management and Workers Compensation Act 1998* (NSW

claims resolved within 9 months. This is compared with 4.9% in NSW, 12.3% in Victoria and 4.7% in QLD[8]. The dispute resolution system of Comcare is not equipped for the expanded workload that would result from more self-insured licensees.

58. The Administrative Appeals Tribunal (AAT) provides merits review of administrative decisions. In short, in the event an insurer denies liability for an injury or any aspect of that injury, the decision after internal review can be referred to the AAT. It is the AAT's role to determine whether the "correct or preferable" decision has been reached. The AAT's role is to provide a mechanism which is fair, just, economical, informal and quick.

59. Despite the goals of the AAT, there are significant issues with its current functions. Specifically, the AAT is already responsible for an enormous amount of matters as they deal not only with workers' compensation, but also tax, social security, migration and Veteran's Affairs matters. In some registries, they need to outsource the work to other registries with capacity.

Common Law Entitlements

60. The cap on general damages under the Comcare scheme has not been revised in 24 years. This has eroded the capacity of the system in any realistic sense to correlate damages available with the magnitude of loss suffered by a particular worker.

61. Most other workers' compensation jurisdictions provide caps at considerably higher levels. For example, Queensland and Victoria both have better than fully funded schemes, and continue to afford workers much higher caps on general damages.

62. Many industries now covered by Comcare such as building and construction and the rail and trucking industries have higher health and safety risks. The processes of the common law serve the occupational, health and safety objectives of the scheme because they examine the causes of injury and expose negligent and harmful practices. The common law holds to account employers whose negligent actions or failures have caused or contributed to a worker's injury.

Income replacement and the Changing Nature of the Australian Workforce

63. The current arrangements do not adequately compensate a range of employees, now covered by the Comcare scheme and by virtue of the Bill, potentially covered. SRCA provisions do not take into consideration persons employed on regular short term contracts, employees who are remunerated on the basis of productivity rather than hours and complicated systems of overtime and remuneration.

64. We have previously argued that the method of assessment of Normal Weekly Earnings (NWE) under the SRCA should be amended to take into consideration the various terms of employment currently available to employees covered by the scheme.

65. The SRCA does not take into account the distinct employment arrangements of employees, nor does it permit consideration of the anticipated contracts to which they would have entered or remuneration they would have received had they not been injured.

66. Volunteers who are injured are not entitled to any income in the event of injury. This is due to their NWE being based on the method of calculation prescribed by sections 8 and 19 of the SRCA. If common law rights were available, such employees would be able to claim compensation for anticipated future entitlements. Again, in order to give effect to the purpose of the SRCA, the most fair and equitable method of treating such workers would be to legislate for a minimum NWE based on the Average Ordinary Time Earnings of Full Time Adults (AWOTEFA).

Age Restrictions

67. Australia has an ageing population. The message is clear; we need to work longer. The Federal Government has responded to this by increasing the age at which people can access the old age

[8] Ibid

pension from 65 to 67 and most recently, has proposed a further extension to 70 in the coming years. The age requirements provided for in section 23(1) and 23(1A) should be increased to coincide with the changes to the old age pension.

68. Alternatively, we commend recent legislative changes in Western Australia that have the effect of providing all injured workers with the same entitlements, regardless of age. This change recognises that older workers are a vital part of Australia's labour force. The changes came into effect in October 2011 and remove a provision that restricted entitlements to weekly income payments for workers aged 64 years or more to a duration of no more than 12 months.

Case studies

69. Slater & Gordon is able to outline case studies to the Committee in relation to the impact of loss of Common Law rights as a result of the expansion of Comcare and the harsh impact that result from the other exclusions proposed by the Bill.

Conclusion

70. The Federal Government has a leadership role to play in promoting health and safety and protecting the rights of injured workers. Until such time as the Government is able to assure Australian workers that Comcare is an exemplar workers' compensation scheme it should not be expanded to include new licensees.

Rachael James
General Manager NSW/ACT
SLATER & GORDON