



FINANCE SECTOR UNION OF AUSTRALIA

FSU Submission

To the Senate Education & Employment
Committee on the Safety, Rehabilitation and
Compensation Amendment Bill 2014

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About the Finance Sector Union of Australia

The Finance Sector Union of Australia (FSU) is the trade union representing employees working in financial and insurance services in Australia. The FSU has been highly active in a range of initiatives to improve workplace safety, and we have supported the ongoing struggle to provide fair compensation to workers who are injured or killed on the job, including participating in industry forums and running strategic prosecutions that successfully reduced the incidence of armed robbery by 80% in the finance sector in NSW from 2002 to 2008.

The FSU is committed to the Union Charter of Workplace Rights, which specifies that all workers have the right to a fair, just and equitable compensation system in the event of a workplace injury. It is our position that workers' compensation should be available to all members of the workforce and should cover injuries arising from travel to, from, or during work, including during recess breaks. Workers' compensation should be available, without exceptions, upon the serious impairment or death of a worker and for any dependents of that worker.

Overview of the FSU submission

This submission addresses the proposed changes to the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) in 2 sections. The first section addresses the FSU's concerns that arise from the proposed expansion of the Comcare scheme and the coverage of the inadequately regulated federal

Work Health and Safety Act 2011 (WHS Act). The second section addresses concerns arising from the expansion of exclusions including excluding access to workers' compensation when injuries occur during off-site recess breaks and the extension of the exclusion for serious and wilful misconduct to deceased and seriously and permanently impaired workers.

The proposed expansion of the Comcare scheme and the coverage of the federal WHS Act

The following proposed changes to the SRC Act will make it easier for new employers to enter the federal workers' compensation scheme, Comcare and to be covered by the federal WHS Act.

- remove the requirement for a ministerial declaration for a corporation to be eligible to be granted a license for self-insurance
- enable certain corporations to apply to join the Comcare scheme
- allow a former Commonwealth authority to apply to be a self-insurer in the Comcare scheme and be granted a group licensee if it meets the national employer test
- enable group licenses to be granted to related corporations
- extend coverage to corporations that are licensed to self-insure.

The FSU is concerned about the changes because, in our experience, it is more difficult to resolve work, health and safety matters that arise in the federal system due to the:

- Poor monitoring and enforcement of the federal WHS Act by Comcare
- Poor management of workers' compensation claims due to:
 - a lack of statutory timeframes for the assessment of claims
 - a lack of provisional liability provisions
 - inadequate governance of conflict of interest that arises from self-insurance

Poor monitoring and enforcement of the federal WHS Act by Comcare

Comcare has functions and powers under the federal WHS Act including monitoring and enforcing compliance with the federal WHS Act, and conducting and defending proceedings under the federal WHS Act for an estimated 400,000¹ full time equivalent (FTE) employees covered by the federal WHS Act.

In the 12 month reporting period from 1 July 2012 to 30 June 2013 Comcare only undertook 342 investigations and 2050 "interventions" (liaison, campaign and stakeholder engagement activities including investigations)² and issued 4 Non-disturbance Notices, 16 Prohibition Notices and 18 Improvement Notices, and did not commence any civil proceedings or criminal prosecutions under the federal WHS Act or accept any undertakings. One previously commenced OHS civil enforcement proceeding and 9 enforceable undertakings continued.³

¹ As at 30 June 2013 as reported in SRCC and Comcare Annual Reports 2012-2013, p38

² Ibid p171

³ Ibid p 182-183

In contrast in the 12 month reporting period for the 2012-2013 financial year, Workcover NSW inspectors covering 3,165,700⁴ employees conducted 19,633 visits to investigate, enforce and follow up safety risks, issued 8186 notices- including 550 Prohibition Notices, 6111 Improvement Notices and 124 Penalty Notices and successfully concluded 98 work health and safety prosecutions. As at 30 June 2013, 172 defendants were before the courts for breaches of work healthy and safety legislation, not including the two matters currently under appeal involving six defendants.⁵

Comcare, for the 2012-2013 financial year, conducted only 0.86 workplace inspections per 1000 employees, and issued 0.095 notices per 1,000 employees compared with Workcover NSW who conducted 6.20 workplace visits per 1,000 employees and issued 2.59 notices per 1,000 employees.

The FSU is deeply concerned that employees currently covered by state and territory work, health and safety legislation will be deeply disadvantaged, given that employees' access to monitoring activities such as workplace visits will see a seven fold decrease, and compliance activities such as the issuing of notices will be 27 times worse under Comcare, as exemplified by the NSW jurisdiction; and enforcement activities such as civil and criminal proceedings will be nil.

Monitoring, compliance and enforcement activities are an integral part of ensuring workplace safety and reducing workplace injuries and deaths and as such inadequate regulation of the federal WHS Act by Comcare has a direct and detrimental effect on employees.

Recommendation: That any expanded access to the federal WHS Act 2011, require Comcare undertake monitoring and enforcement activities commensurate to other jurisdictions so that employees are not disadvantaged by the transfer of jurisdictions.

Poor management of workers' compensation claims: lack of statutory timeframes for the assessment of claims

Comcare unlike all other jurisdictions, with the exception of Western Australia do not have any statutory timeframes for assessing workers' compensation claims.⁶ Whilst the SRC Act at section 61 (1a) states that *The determining authority must consider and determine each claim for compensation under section 14 within the period prescribed by the regulations;* the regulations do not prescribe any timeframes.

The SRCC and Comcare Annual Reports 2012-2013 state that 80% of all licensees determine injury claims within 20 calendar days and disease claims within 60 calendar days, leaving 1 in 5 injured employees with an unassessed claim and often no income for more than 20 days, and leaving 1 in 5 employees who have a dust disease claim with an unassessed claim and often no income for more than 60 days.

There is also a wide divergence in processing times with the worst performing licensee not meeting the benchmark for 47% of claims. The report also states that 87% of reconsiderations by licensees are decided within 30 calendar days, but again there is wide divergence with the worst performing

⁴ In 2010 – 2011 as reported in Comparison of workers' compensation arrangements in Australia and New Zealand, 2012–13, p21

⁵ The WorkCover Authority of NSW 2012–2013 Annual Report, p18

⁶ Comparison of workers' compensation arrangements in Australia and New Zealand, 2012–13, p35

licensee not meeting the benchmark for 46% of reconsiderations.⁷ This divergence is reflective of the inequity of process that a lack of statutory timeframes allows.

Indeed the poor perception of the quality of service provided by Comcare for injured workers is reflective of the lack of time frames with Comcare receiving very low ratings for responsiveness:

- *Responding promptly to your request or queries* only 69% satisfied and down from 73% in the 2011-2012 reporting period
- *Being able to get hold of the right person* only 67% satisfied and down from 72% in the 2011-2012 reporting period
- *Keeping you informed about you claim* only 67% satisfied and down from 71% in the 2011-2012 reporting period.

Similarly appeals to the Administrative, Appeal Tribunal (AAT) can be lengthy and many workers are discouraged from pressing their claim as the AAT is a costs jurisdiction, with Comcare disputes generally taking more time to resolve than disputes in other jurisdictions⁸ with 51.6% of disputes remaining unresolved after 9 months, substantially higher than the Australian average where only 9.2% of disputes remain unsolved after 9 months.⁹

The FSU is deeply concerned about a lack of statutory time frames for the acceptance of claims for employees currently covered by Comcare which creates uncertainty for employees and denies employees equity of process in accessing workers' compensation. The FSU is also concerned about the diminution of the rights of employees who are now covered under state and territory legislation and who may be transferred to the federal jurisdiction under the proposed expansion of the scheme.

Recommendation: That the Safety, Rehabilitation and Compensation Regulations 2002 be amended to include statutory timeframes for the processing of claims.

Poor management of workers' compensation claims: lack of provisional liability provisions

Unlike the NSW jurisdiction, Comcare does not accept provisional liability whilst processing claims.¹⁰ This means that employees are often left without any income for considerable periods of time while their claim is being determined, creating financial hardship for employees and their dependents or forcing employees to return to work before they are medically fit to do so, further exacerbating their injuries.

The lack of certainty of processing times as described in the previous section of this submission combined with financial hardship often results in employees experiencing additional stress undermining Comcare's purported intention of facilitating *an early and safe return to work*.¹¹

⁷ SRCC and Comcare Annual Reports 2012-2013, p 60

⁸ Comparative Performance Monitoring Report 15th Edition p37

⁹ Ibid P36

¹⁰ Comparison of workers' compensation arrangements in Australia and New Zealand, 2012-13, p35

¹¹ SRCC and Comcare Annual Reports 2012-2013, p66

The FSU is deeply concerned about the impact of a lack of provisional liability provisions on employees currently covered by the Comcare scheme and the proposed reduction of rights for those employees who are currently in the NSW jurisdiction and who may be transferred to the Comcare scheme as a result of the SRC Amendment Bill 2014.

Recommendation: That the legislation be amended to include an acceptance of provisional liability in the same terms as the NSW jurisdiction.

Poor management of workers' compensation claims: inadequate governance of conflict of interest that arises from self-insurance

A lack of statutory time frames and no acceptance of provisional liability combined with self-insurers self-interest can result in financial and emotional distress for employees, a late and unsafe return to work and additional risks for the employer as demonstrated by the following case study.

In March 2013 an employee in the finance sector notified their employer, a self-insurer under Comcare, of a physiological injury arising from bullying and harassment in the workplace. The employee mistakenly submitted a state based workers' compensation claim form.

The employer advised the employee that they were prioritising the investigation of the grievance arising from the bullying and harassment and would not proceed with the workers' compensation claim.

On 10 May 2013 the employee, after advice from the FSU, submitted a Comcare workers' compensation claim and pressed the employer for it to be processed, however; the employer continued to disregard the claim.

On 3 June 2013, 4 June 2013, 9 July 2013, 11 July 2013 and 24 July 2013 the FSU made written representations to the employer to process the claim. The employee also made numerous requests including a written request on 11 July 2013.

The employer discontinued the employee's income in early August 2013 and declined the claim in late August 2013. The employee then returned to work and was adversely treated because of the Comcare claim.

In early 2014 the FSU reached a confidential settlement with the employer on the employee's behalf.

As evidenced by the case study, a lack of statutory timeframes under Comcare, no acceptance of provisional liability and poor governance of self-insurers can create great uncertainty for employees attempting to access workers' compensation, deny employees income whilst the claim is being determined and inhibit an early and safe return to work.

The FSU is very concerned about the combined impact of poor governance, a lack of statutory timeframes for processing claims and the lack of provisional liability provisions for employees currently under the Comcare scheme and for those employees who may be transferred to the scheme as a result of the SRC Amendment Bill 2014.

Recommendation: That the legislation be amended to include enforceable governance mechanisms for licensees, that in fact are monitored, enforced and prosecuted where necessary.

The proposed expansion of exclusions

The following proposed changes to the SRC Act will reduce employees' entitlements under the Act and operate to the detriment of employees:

- *Safety, Rehabilitation and Compensation Act 1988* to exclude access to workers' compensation when injuries occur during recess breaks away from an employer's premises or a person engages in serious and wilful misconduct

The FSU is concerned about the changes because they directly diminish employee entitlements including to procedural fairness and create greater uncertainty.

Exclude access to workers' compensation when injuries occur during recess breaks that are taken off-site

The SRC Amendment Bill 2014 proposes to replace paragraph 6(1)(b) of the SRC Act to provide that an injury sustained by an employee will only be eligible for compensation if the employee is on the employer's premises. Employees who are temporarily absent from the premises, such as on a recess break in the course of their employment, will no longer be eligible for compensation.

The proposed change would diminish insurance coverage for employee currently covered by Comcare and disadvantage employees who are currently covered by the New South Wales, Victorian, Queensland and Northern Territory jurisdictions¹² who may be transferred to Comcare as a result of the SRC Amendment Bill 2014.

The proposed change would also create greater uncertainty for employees in relation to their rights to support if injured as exemplified by employees in the finance sector who are increasingly working from home, or are routinely expected to travel between worksites during their recess periods or for employees such as mobile bankers who may not be close to a worksite for a recess period as a result of their employment. This uncertainty will invariably lead to greater disputation which we assert will negate the *modest savings*¹³ expected from the change.

Recommendation: That the proposed exclusion of access to workers' compensation when injuries occur during recess breaks taken off-site be rejected.

Extend exclusion for serious and wilful misconduct to deceased and seriously and permanently impaired employees

The SRC Amendment Bill 2014 proposes to remove wording at the end of subsection 14(3) of the SRC Act that currently serves to extend compensation coverage to employees who engage in serious and wilful misconduct where that misconduct results in death or serious and permanent impairment.

¹² Comparison of workers' compensation arrangements in Australia and New Zealand, 2012–13, p25

¹³ Explanatory Memorandum Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, pxliv

The proposal interferes with procedural fairness as, if the amendment were to pass, the onus of proof would fall to the worker or (in the case of death) the worker's estate, making it relatively easy for an employer to discharge that onus in the face of a significantly injured or deceased employee.

The potential impact of this amendment in cost savings to licensees and premium payers in claims costs or premiums is expected to be negligible as the cases under this provision are rare.¹⁴

The FSU is deeply concerned that an amendment is being proposed with negligible cost saving that undermines procedural fairness and exposes the dependants of employees, who may have purportedly had a momentary lapse of judgement, to severe emotional and financial harm.

Recommendation: That the proposed extension of the exclusion for serious and wilful misconduct to deceased and serious and permanently impaired employees be rejected.

Summary

As demonstrated by this submission, the SRC Amendment Bill 2014 disadvantages employees by making it easier for new employers to enter the federal workers' compensation scheme, Comcare, and to be covered by the federal WHS Act exposing employees currently in other jurisdictions to the inferior monitoring, compliance and prosecution activities of Comcare, and poor management of workers' compensation claims including a lack of statutory timeframes for claims processing, no acceptance of provisional liability and inadequate governance of self-insurers.

The SRC Amendment Bill 2014 also removes existing entitlements including insurance cover for off-site recess breaks, and compensation for death and serious and permanent impairment for employees who have engaged in serious and wilful misconduct; for negligible or no gain.

As such the FSU recommends that the SRC Amendment Bill 2014 be comprehensively revised to include the following or in the alternative that the Bill be scrapped.

List of Recommendations

1. **That any expanded access to the federal WHS Act 2011, require Comcare undertake monitoring and enforcement activities commensurate to other jurisdictions so that employees are not disadvantaged by the transfer of jurisdictions.**
2. **That the Safety, Rehabilitation and Compensation Regulations 2002 be amended to include statutory timeframes for the processing of claims.**
3. **That the legislation be amended to include an acceptance of provisional liability in the same terms as the NSW jurisdiction.**
4. **That the legislation be amended to include enforceable governance mechanisms for licensees, that in fact are monitored, enforced and prosecuted where necessary.**
5. **That the proposed exclusion of access to workers' compensation when injuries occur during recess breaks taken off-site be rejected.**
6. **That the proposed extension of the exclusion for serious and wilful misconduct to deceased and serious and permanently impaired employees be rejected.**

Or in the alternative that the SRC Amendment Bill 2014 be scrapped.

¹⁴ Ibid pxliv